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INDEX DIGEST

OF

BANKRUPTCY DECISIONS,

CONTAINING THE

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES  
FROM 1800 TO 1899, AND OF THE FEDERAL AND STATE  
COURTS OF LAST RESORT UNDER THE ACT OF 1867.

BY

EDWIN C. BRANDENBURG, LL. M.,

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COURTS OF THE DISTRICT OF COLUMBIA.

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## PREFACE.

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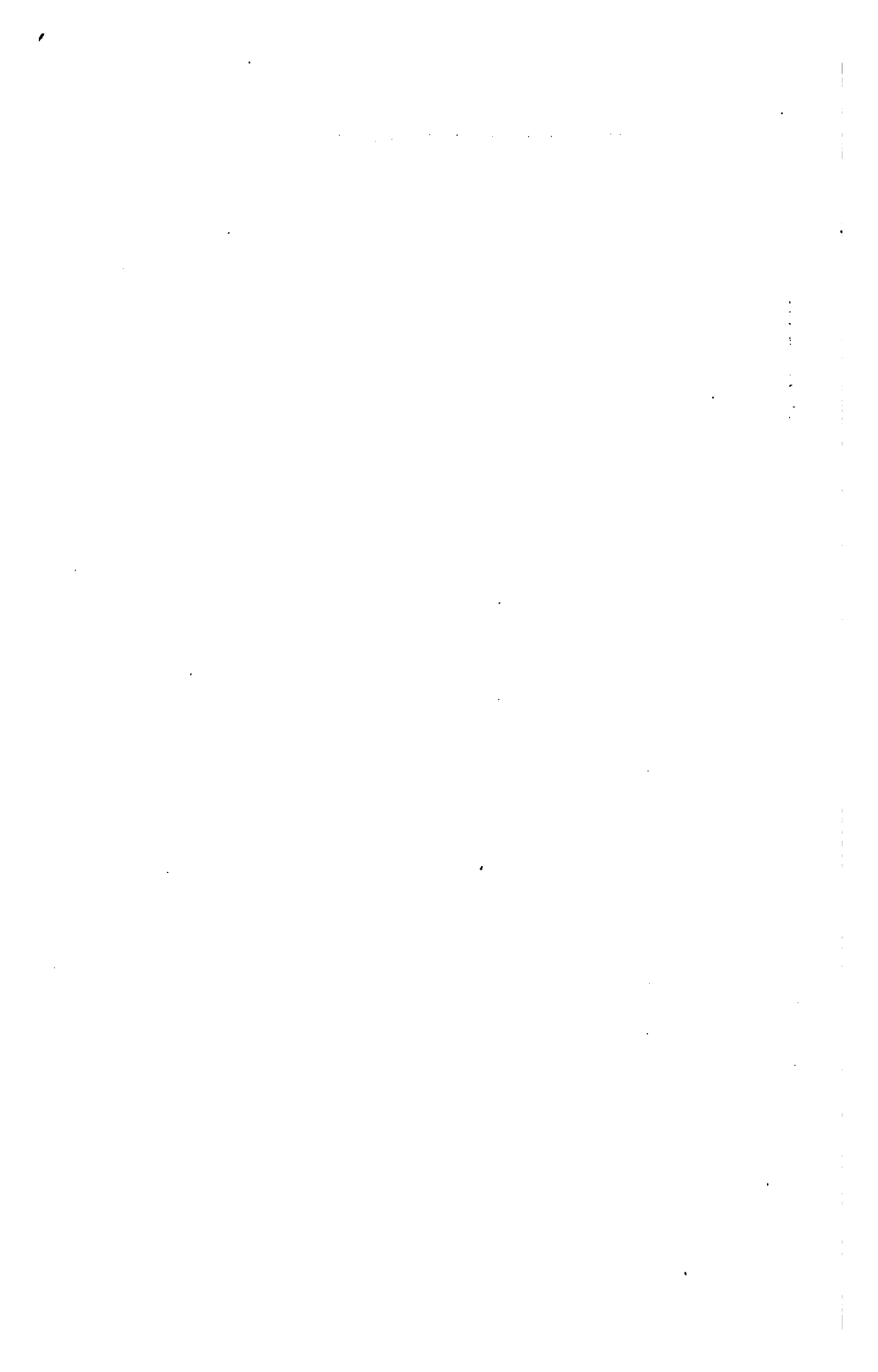
The recent enactment of the Federal Statute on Bankruptcy finds a large proportion of the legal profession without practical experience in that branch of the law. The growth of this practice within the past few months has been so material that the need of the aid afforded by the decisions under the act of 1867, to which the present act bears a close resemblance, has already been felt. Bearing this in mind and the necessity for a comprehensive digest of the decisions under the former act, so as to make them readily available to the busy lawyer, this book has been prepared. The work of preparation has been one of unusual magnitude, as every case has been carefully digested, resort being had to original investigation instead of relying upon the prepared syllabi, text-books or partial digests.

All relevant decisions of the Supreme Court of the United States, together with all decisions reported in the National Bankruptcy Registers, are included in the digest. The citations to the first four volumes of the National Bankruptcy Registers are to the paging of the quarto volumes. Where cases were found in the octavo volumes and not in the original reports, that fact is indicated. If a case is reported elsewhere than in the National Bankruptcy Register, a citation is given to all of the books where it is found.

Opportunity is here taken to publicly express the obligations of the author for valuable assistance to Messrs. Irving U. Townsend, Edward F. Colladay, H. F. White and H. P. Heath of the District of Columbia Bar.

E. C. B.

WASHINGTON, D. C.,  
April, 1899.





## ABBREVIATIONS USED IN THIS DIGEST.

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Abb. (U. S.) . . . . .	Abbott, U. S. Courts.
Alb. Law J. . . . .	Albany Law Journal.
Amer. Law Reg. (N. S.) . . . . .	American Law Register.
Amer. Law Rev. . . . .	American Law Review.
Amer. Law T. Rep. Bankr. . . . .	American Law Times Reports, Bankruptcy.
Amer. Law T. Rep. U. S. Cts. . . . .	American Law Times Reports, U. S. Courts.
Balt. Law T. . . . .	Baltimore Law Transcript.
Ben. . . . .	Benedict, U. S. Courts.
Biss. . . . .	Bissell, U. S. Courts.
Blatchf. . . . .	Blatchford, U. S. Circuit Court.
Cent. Law J. . . . .	Central Law Journal.
Chi. Leg. News . . . . .	Chicago Legal News.
Cin. Law Bul. . . . .	Cincinnati Law Bulletin.
Cliff. . . . .	Clifford, U. S. Circuit Court.
Dill. . . . .	Dillon, U. S. Circuit Court.
Hask. . . . .	Haskell, U. S. Court.
How. Pr. . . . .	Howard's Practice, New York.
Hughes . . . . .	Hughes, U. S. Circuit Court.
Int. Rev. Rec. . . . .	Internal Revenue Record.
Leg. Int. . . . .	Legal Intelligencer.
Leg. Op. . . . .	Legal Opinions.
Lowell . . . . .	Lowell, U. S. Courts.
N. B. R. . . . .	National Bankruptcy Register.
N. Y. Wkly. Dig. . . . .	New York Weekly Digest.
Phila. . . . .	Philadelphia Reports.
Pittsb. Leg. J. . . . .	Pittsburg Legal Journal.
Sawy. . . . .	Sawyer, U. S. Circuit Court.
Wall. . . . .	Wallace, U. S. Supreme Court.
West. Jur. . . . .	Western Jurist.
Wkly. Notes Cas. . . . .	Weekly Notes of Cases, Philadelphia.
Woods . . . . .	Woods, U. S. Circuit Court.
Woolw. . . . .	Woolworth, U. S. Circuit Court.



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- White v. Griffing** (18 N. B. R. 399). Lease, 2; Surety, 19.
- White v. Jones** (6 N. B. R. 175; 29 Leg. Int. 325; Fed. Cas. 17,550). Estate, 237; Liens, 26; Pleading and Practice, 293; Trust, 4; Trustees, 44.
- White & May, In re** (1 N. B. R. 1; 2 Ben. 85; Fed. Cas. 17,531).
- Whitehead, In re** (2 N. B. R. 180; 1 Chi. Leg. News, 326; Fed. Cas. 17,562). Claims, 73; Costs and Fees, 53; Exemptions, 60, 61; Mortgages, 34.
- Whitehouse, In re** (4 N. B. R. 15; 1 Lowell, 429; Fed. Cas. 17,564). Arrest, 2.
- Whithed et al., Petitioners, v. Pillsbury & Titcomb, Ass.** (13 N. B. R. 241; Fed. Cas. 17,572). Collusion, 2; Mortgages, 133, 158; Subrogation, 1.
- Whiting, Ex parte; In re Dow et al.** (14 N. B. R. 307; 2 Lowell, 472; Fed. Cas. 17,573). Sales, 78; Secured Claims, 56; Set-off, 3, 18-20.
- Whitman, Ass., v. Butler** (8 N. B. R. 487; Fed. Cas. 17,579). Injunction, 19; Sales, 85.
- Whitney, In re** (18 N. B. R. 563; Fed. Cas. 17,581). Arrest, 22; Courts, 127; Res Adjudicata, 4; Stay of Proceedings, 22, 23.
- Whitney et al., In re** (14 N. B. R. 1; 13 Lowell, 455; 8 Chi. Leg. News, 195; Fed. Cas. 17,580). Discharge, 195, 196.
- Whittaker, In re** (4 N. B. R. 41; Fed. Cas. 17,598). Claims, 155.
- Whyte, In re** (9 N. B. R. 267; Fed. Cas. 17,606). Agent, 8; Proof, etc., 29.
- Wickham, Ass., v. Valle's Ex'rs et al.** (11 N. B. R. 83; Fed. Cas. 17,613). Choses in Action, 1.
- Wicks & Co., Ass. of, v. Perkins** (13 N. B. R. 280; 1 Woods, 883; Fed. Cas. 17,615). Liens, 38, 39.
- Wielarski, In re** (4 N. B. R. 130; 4 Ben. 468; Fed. Cas. 17,619). Petition, 152.
- Wiener, In re** (14 N. B. R. 218; 3 N. Y. Wkly. Dig. 95; Fed. Cas. 17,620). Courts, 278.
- Wiggin, In re** (1 N. B. R. 90; 1 Lowell, 237; Fed. Cas. 17,061). Place of Business, 12, 13.
- Wilbur, In re** (3 N. B. R. 71; 1 Ben. 527; 2 Amer. Law T. Rep. Bankr. 171; Fed. Cas. 17,633). Injunction, 48; Liens, 16.
- Wilbur, Ass., v. The Stockholders of the Corporation** (18 N. B. R. 178; 13 Phila. 479; 35 Leg. Int. 346; 26 Pittsb. Leg. J. 15; Fed. Cas. 17,636). Corporations, 28-30; Dividends, 24; Estate, 209, 210; Set-off, 15.
- Wilkins v. Davis** (15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664). Discharge, 303; Estate, 249, 252; Partners, 63, 64, 120, 121, 124, 157; Trustees, 57.
- Wilkinson, In re** (3 N. B. R. 74; 2 West. Jur. 350; 16 Pittsb. Leg. J. 237; Fed. Cas. 17,667). Discharge, 155.
- Williams, In re** (2 N. B. R. 28; Fed. Cas. 17,704). Costs and Fees, 35, 67.
- Williams, In re** (2 N. B. R. 79; 3 Amer. Law Rev. 374; 1 Amer. Law T. Rep. Bankr. 107, 113; Fed. Cas. 17,705). Claims, 258; Costs and Fees, 118; Dividends, 4.
- Williams, In re** (14 N. B. R. 132; Fed. Cas. 17,706). Acts of Bankruptcy, 20; Attachment, 60; Conveyances, 21; Judgment, 15.
- Williams et al., In re** (3 N. B. R. 74; 1 Lowell, 406; Fed. Cas. 17,703). Partners, 22; Petition, 145; Preferences, 114.
- Williams v. Butcher** (12 N. B. R. 143). Collateral Attack, 1; Discharge, 320.
- Williams v. Harkins** (15 N. B. R. 34). Discharge, 286.
- Williams v. Heard** (140 U. S. 529). Appeals and Writs of Error, 38; Estate, 39.
- Williams & McPheeters, In re** (11 N. B. R. 145; 6 Biss. 233; 7 Chi. Leg. News, 49; Fed. Cas. 17,700). Arrest, 18; Courts, 215; Fraud, 85; Petition, 28, 129.
- Williams v. Merritt** (4 N. B. R. 706). Adjudication, 34.
- Williamson et al., Ass., v. Colcord and Wife** (13 N. B. R. 319; 1 Hask. 620; Fed. Cas. 17,752). Claims, 8; Contracts, 12; Gift, 1.
- Willis v. Carpenter et al.** (14 N. B. R. 521; Fed. Cas. 17,770). Claims, 222; Estoppel, 9, 10; Jury Trials, 5; Pleading and Practice, 251.
- Willmott, In re** (2 N. B. R. 76; 1 Amer. Law T. Rep. Bankr. 121; Fed. Cas. 17,778). Discharge, 62.
- Wills et al. v. Claffin et al.** (13 N. B. R. 437; 92 U. S. 185). Evidence, 18, 87; Suits, 6.
- Wilmot v. Mudge** (103 U. S. 217). Composition, 155; Discharge, 250.
- Wilson, In re** (13 N. B. R. 253; 2 Lowell, 453; Fed. Cas. 17,784). Discharge, 145; Partners, 16.

- Wilson, In re (8 N. B. R. 396; 5 Biss. 387; 18 Int. Rev. Rec. 93; 5 Chi. Leg. News, 549; 5 Leg. Op. 153; 21 Pittsb. Leg. J. 22; Fed. Cas. 17,780). Acts of Bankruptcy, 2, 32.
- Wilson et al., In re (18 N. B. R. 300; Fed. Cas. 17,785). Composition, 5, 10, 22, 106; Examination of Bankrupt, 70.
- Wilson, Ass., v. Brinkman et al. (2 N. B. R. 149; 1 Chi. Leg. News, 193; 2 Amer. Law T. Rep. Bankr. 65; Fed. Cas. 17,794). Execution, 13; Insolvency, 30; Preferences, 124.
- Wilson v. Capuro (4 N. B. R. 714). Estate, 2.
- Wilson v. Childs; Anshutz v. Campbell; In re Weamer (8 N. B. R. 527; 6 Chi. Leg. News, 27; 10 Phila. 275; 5 Leg. Op. 182; 30 Leg. Int. 321; 21 Pittsb. Leg. J. 17; Fed. Cas. 17,796). Liens, 4.
- Wilson, Ass., v. City Bank of St. Paul (5 N. B. R. 270). Insolvency, 9; Preferences, 133; Trustees, 205.
- Wilson, Ass., v. City Bank of St. Paul (9 N. B. R. 97; 17 Wall. 473). Liens, 96; Preferences, 71, 241.
- Wilson & Shoher v. Bank of North Carolina (10 N. B. R. 290; Fed. Cas. 894). Banks, 36.
- Wilson, Ass., v. Stoddard (4 N. B. R. 76; 2 Chi. Leg. News, 161; Fed. Cas. 17,838). Evidence, 88; Pleading and Practice, 89.
- Wilt v. Stickney, Ass. (15 N. B. R. 24; 5 Amer. Law Rec. 630; Fed. Cas. 17,854). Pleading and Practice, 115.
- Winchester v. Heiskell (119 U. S. 450). Appeals and Writs of Error, 4.
- Winkens, In re (2 N. B. R. 113; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 17,875). Discharge, 13; Partners, 61; Petition, 50.
- Winn, In re (1 N. B. R. 131; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876). Conflict of Laws, 7; Courts, 139; Estate, 16; Liens, 113, 125; Secured Claims, 26.
- Winship v. Phillips (14 N. B. R. 50). Liens, 21.
- Winsor, In re (16 N. B. R. 153; 9 Chi. Leg. News, 403; 2 Cin. Law Bul. 212; Fed. Cas. 17,885). Books of Account, 2, 3, 37; Crimes and Offenses, 3; Estate, 183; Mortgages, 113.
- Winter v. Iowa, Minnetona & North Pacific Ry. Co. (7 N. B. R. 289; 2 Dill. 487; 6 West. Jur. 562; 5 Chi. Leg. News, 74; 6 Alb. Law J. 358; Fed. Cas. 17,890). Acts of Bankruptcy, 54, 80; Corporations, 4.
- Winters et al. v. Claitor et al. (18 N. B. R. 533). Conveyances, 47; Liens, 69, 70; Married Woman, 7.
- Wisner v. Brown (122 U. S. 214). Limitations, Statute of, 52; Trustees, 114.
- Wiswall et al. v. Campbell et al., Ass. etc. (15 N. B. R. 421; 93 U. S. 347). Appeals and Writs of Error, 30; Pleading and Practice, 268; Proof, etc., 8.
- Witherow v. Fowler (7 N. B. R. 339; Pac. Law Rep. 102; 6 Alb. Law J. 422; Fed. Cas. 17,919). Estate, 258; Partners, 123.
- Witkowski, In re (10 N. B. R. 209; Fed. Cas. 17,920). Discharge, 217, 317; Examination of Bankrupt, 76; Trustees, 78.
- Witt, Ass., v. Hereth (13 N. B. R. 106; 6 Biss. 474; 8 Chi. Leg. News, 41; 1 N. Y. Wkly. Dig. 436; Fed. Cas. 17,921). Collusion, 3; Judgment, 30; Pleading and Practice, 12, 99.
- Wolf, In re (17 N. B. R. 423; 4 Sawy. 168; Fed. Cas. 17,923). Acts of Bankruptcy, 74.
- Wood, J. P., In re (5 N. B. R. 421; Fed. Cas. 17,937). Conveyances, 68.
- Wood, In re (13 N. B. R. 96; 6 Ben. 339; 1 N. Y. Wkly. Dig. 366; Fed. Cas. 17,935). Petition, 131.
- Wood v. Bailey, Ass. (12 N. B. R. 132; 21 Wall. 640). Appeals and Writs of Error, 24.
- Wood v. Hazen (15 N. B. R. 491). Discharge, 65, 97.
- Wood Mowing & Reaping Machine Co. v. Brooke, Ass. (9 N. B. R. 395; 2 Sawy. 576; Fed. Cas. 17,980). Courts, 26; Estate, 37; Sales, 75, 76.
- Wood v. Owings (1 Cranch, 239). Conveyances, 18.
- Wooddail, Adm'x, v. Austin & Holliday (10 N. B. R. 545). Nonsuit, 3; Pleading and Practice, 255.
- Woodford & Chamberlain, In re (13 N. B. R. 575; 1 Cin. Law Bul. 37; Fed. Cas. 17,972). Claims, 212, 279; Petition, 11, 77.
- Woods, T., In re (7 N. B. R. 126; 29 Leg. Int. 236; 20 Pittsb. Leg. J. 21; Fed. Cas. 17,990). Acts of Bankruptcy, 5; Definitions, 30; Evidence, 85; Insolvency, 18.



- Woods et al. v. Buckewell et al.** (7 N. B. R. 405; 2 Dill. 38; 6 Alb. Law J. 291; Fed. Cas. 17,991). Trustees, 86.  
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**Woodward et al., In re** (3 N. B. R. 177; 4 Ben. 102; Fed. Cas. 17,999). Evidence, 53.  
**Woolfolk et al. v. Gunn** (10 N. B. R. 526). Pleading and Practice, 106.  
**Woolfolk v. Murray, Bryan & Sims** (10 N. B. R. 540; Fed. Cas. 18,028). Courts, 167; Exemptions, 15.  
**Woolford, In re** (3 N. B. R. 113; 4 Ben. 9; Fed. Cas. 18,029). Evidence, 69.  
**Woolsey v. Cade** (15 N. B. R. 238). Discharge, 239; Statutory Construction, 81.  
**Woolums et al., In re** (1 N. B. R. 131; Fed. Cas. 18,034). Discharge, 60.  
**World Co. v. Brooks** (3 N. B. R. 146). Discharge, 205; Stay of Proceedings, 7.  
**Worthington, In re** (16 N. B. R. 52; 7 Biss. 455; 1 N. W. Rep. (O. S.) 109; 9 Chi. Leg. News, 346; 4 Law & Eq. Rep. 78; 16 Alb. Law J. 63; 23 Int. Rev. Rec. 233; 2 Cin. Law Bul. 189; Fed. Cas. 18,051). Holiday, 1; Judgment, 64, 65.  
**Worthington, In re** (14 N. B. R. 383; 3 Cent. Law J. 526; 8 Chi. Leg. News, 362; 14 Alb. Law J. 153; Fed. Cas. 18,052). Courts, 144.  
**Wright, In re** (1 N. B. R. 91; Fed. Cas. 18,069). Certification, 2.  
**Wright, In re** (3 N. B. R. 430; 3 Biss. 359; Fed. Cas. 18,067). Exemptions, 59.  
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**Wright v. Filley** (4 N. B. R. 197; 1 Dill. 171; 5 West. Jur. 212; Fed. Cas. 18,077). Preferences, 246.  
**Wright et al., Ass. etc., v. The First Nat. Bank of Greensburg** (18 N. B. R. 87; 8 Biss. 243; 6 N. Y. Wkly. Dig. 543; 18 Alb. Law J. 115; 2 Nat. Bank Cas. (Browne), 188; 10 Chi. Leg. News, 348; 6 Reporter, 229; 26 Pittsb. Leg. J. 11; Fed. Cas. 18,078). Estate, 112, 152; Torts, 2, 8.  
**Wright v. Johnson** (4 N. B. R. 626; 8 Blatchf. 150; Fed. Cas. 18,082). Pleading and Practice, 161.  
**Wright & Peckham, In re** (2 N. B. R. 14; 15 Pittsb. Leg. J. 553; Fed. Cas. 18,070). Discharge, 246, 253; Fraud, 87.  
**Wrisley et al., In re** (17 N. B. R. 259; Fed. Cas. 18,103). Liens, 8; Mortgages, 93.  
**Wronkow et al., In re** (18 N. B. R. 81; 15 Blatchf. 38; 26 Pittsb. Leg. J. 2; Fed. Cas. 18,105). Composition, 23, 114, 137; Courts, 72; Meetings, 12, 13.  
**Wyatt, In re** (2 N. B. R. 94; 1 Chi. Leg. News, 107; Fed. Cas. 18,106). Discharge, 20; Estate, 285, 292; Gift, 3.  
**Wylie, In re** (2 N. B. R. 53; Bank Ct. Rep. 123; 1 Chi. Leg. News, 30; Fed. Cas. 18,109). Estate, 43.  
**Wynne, In re** (4 N. B. R. 5; Chase, 227; 9 Amer. Law Reg. (N. S.) 627; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117). Acts of Bankruptcy, 58; Conveyances, 67; Courts, 158; Estate, 62, 63, 96; Liens, 61, 119; Mortgages, 100; Record, 3; Secured Claims, 31; Time, 8; Trustees, 36.
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- Yeatman et al., Ass. etc., v. The New Orleans Saving Inst.** (17 N. B. R. 187; 95 U. S. 764). Estate, 81; Pledge, 67.  
**York & Hoover, In re** (4 N. B. R. 156; 1 Abb. (U. S.) 503; 10 Amer. Law Reg. (N. S.) 36; Fed. Cas. 18,139). Appeals and Writs of Error, 18; Courts, 245, 246; Pleading and Practice, 226; Statutory Construction, 74.  
**York & Hoover, In re** (3 N. B. R. 163; Fed. Cas. 18,138). Mortgages, 11, 12.  
**Young, In re** (15 N. B. R. 205; 1 Tex. Law J. 7; Fed. Cas. 18,149). Claims, 233; Exemptions, 38.  
**Young et al., In re** (3 N. B. R. 111; Fed. Cas. 18,148). Exemptions, 107.  
**Young et al. v. Ridenbaugh's Adm'r** (11 N. B. R. 563; 3 Dill. 239; 7 Chi. Leg. News, 242; Fed. Cas. 18,173). Claims, 220; Death, 4; Evidence, 39.
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- Zahn, Ass. v. Fry et al.** (9 N. B. R. 546; 10 Phila. 243; 31 Leg. Int. 197; 21 Pittsb. Leg. J. 155; Fed. Cas. 18,198). Courts, 134;

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| <p>Estate, 129; Judgment, 49; Preferences, 138, 139.</p> <p>Zantzinger v. Ribble, Ass. (4 N. B. R. (8 vo. ed.) 724). Estate, 120; Trustees, 65.</p> <p>Zeiber v. Hill (8 N. B. R. 239; 1 Sawy. 268; Fed. Cas. 18,206). Costs and Fees, 14, 24.</p> <p>Zimmer v. Schleeauf (11 N. B. R. 318). Stay of Proceedings, 20.</p> <p>Zinn et al., In re (4 N. B. R. 123; 40 How. Pr. 461; Fed. Cas. 18,216). Trustees, 98.</p> | <p>Zinn et al., In re (4 N. B. R. 145; 4 Ben. 500; 43 How. Pr. 64; Fed. Cas. 18,215). Trustees, 141.</p> <p>Zug et al., In re (16 N. B. R. 280; 23 Int. Rev. Rec. 392; 34 Leg. Int. 402; 25 Pittsh. Leg. J. 29; Fed. Cas. 18,222). Appeals and Writs of Error, 21; Estate, 245, 254; Partners, 81; Pleading and Practice, 190; State Laws, 14.</p> |
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# DIGEST OF DECISIONS.

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## ABANDONMENT.

See SCHEDULE, 47.

## ACCOMMODATION NOTE.

See ACTS OF BANKRUPTCY, 40; COMMERCIAL PAPER, V.

## ACCOUNTS.

See REFEREE, 51, 52.

1. The provision in section 28 (act of 1867) for auditing the accounts of the assignee at the meeting for the final dividend cannot be regarded as preventing the auditing by the register of such accounts at the second meeting of creditors. In re Clark & Bininger, 6 N. B. R. 197; 5 Ben. 889; Fed. Cas. 2,799.

2. Where accounts of assignee are filed at the second meeting without notice to the creditors, the register is justified in deferring the audit until the next meeting. Id.

3. At a second meeting of creditors, called under section 27 (act of 1867), the assignee filed his accounts without giving notice. Thereupon the register announced that said accounts would not be audited, and passed them until the next meeting. The assignee applied to the district court to compel the register to audit accounts. It was held the register was justified in refusing. Id.

4. Creditors are not bound to object to the assignee's account save at a meeting called pursuant to the provisions of the twenty-eighth section of the act (1867). In re Clark, 9 N. B. R. 67; Fed. Cas. 2,810.

5. Where money is paid upon a running account, and there has been no appropriation of the payments, the law will apply it first on the oldest debts. Cook v. Waters et al., 9 N. B. R. 155.

## ACCRETION.

See ESTATES, 52.

## ACKNOWLEDGMENTS.

See POWER OF ATTORNEY, 8, V.

## ACTIONS.

See SUITS.

## ACTS OF BANKRUPTCY.

### I. WHAT ARE.

- (a) *In General.*
- (b) *Arrest for Debt.*
- (c) *Departure of Debtor.*
- (d) *General Assignment.*
- (e) *Mortgage.*
- (f) *Payment.*
- (g) *Removal of Property.*
- (h) *Suspension of Commercial Paper.*
- (i) *Transfer of Property.*

### II. WHAT ARE NOT.

- (a) *Mortgage.*
- (b) *Suspension of Commercial Paper.*
- (c) *Transfer of Property.*

See ASSIGNMENTS, II; CONVEYANCES, 60; CORPORATIONS, 2, 11; DISCHARGE, 118; EVIDENCE, 106; INSANITY, 1; JUDGMENTS, 70; MARRIED WOMAN, 18, 23; NOTICE, 25; PETITION, 6; PLEADING AND PRACTICE, 102, 228, 259; PREFERENCE.

### I. WHAT ARE.

- (a) *In General.*

1. The purpose of the bankrupt act being to enforce equal distribution of an insolvent's estate, every act of an insolvent that

tends to defeat that purpose should be construed strictly against him, and every presumption should be indulged to secure the full benefit of this cardinal principle of the law. *Hall, Ass. etc., v. Wager and Fales*, 5 N. B. R. 181; 3 Biss. 28; 5 West. Jur. 538; 3 Chi. Leg. News, 401; Fed. Cas. 5,951.

2. Insolvency is not an essential element entering into and constituting the act of bankruptcy. In *re Wilson*, 8 N. B. R. 396; 5 Chi. Leg. News, 549; 21 Pittsb. Leg. J. 22; 5 Biss. 387; Fed. Cas. 17,780.

3. An attaching creditor has a right to intervene after default of the debtor and contest the commission of the alleged act of bankruptcy. In *re Jonas*, 16 N. B. R. 452; Fed. Cas. 7,442.

4. Where a debtor has committed no act of bankruptcy, and will not voluntarily petition, a creditor may sue him so as to force him to commit an act of bankruptcy, and then himself proceed against him, for such act, in involuntary bankruptcy. *Warren v. Tenth Nat. Bank et al.*, 7 N. B. R. 481; 10 Blatchf. 498; Fed. Cas. 17,202.

5. While the act of 1867 does not make the act of a debtor in procuring a judgment against him one of bankruptcy, the circumstances may be considered by a jury in determining the truth of an allegation that the debtor has committed an act of bankruptcy by procuring or suffering his property to be taken in execution. In *re Woods*, 7 N. B. R. 126; 29 Leg. Int. 236; 20 Pittsb. Leg. J. 21; Fed. Cas. 17,990.

### (b) *Arrest for Debt.*

See ARREST, 10, 11, 16.

6. Under the act of 1867 a debtor who, having been arrested for a debt provable in bankruptcy, immediately gives bail and is released from close custody, has not committed an act of bankruptcy, although the process on which he was arrested is not discharged within "seven days." In *re Davis*, 3 N. B. R. 89; 3 Ben. 482; Fed. Cas. 3,615.

### (c) *Departure of Debtor.*

7. Where, under the act of 1867, the creditor shows that a number of judgments have been rendered against the debtor and executions returned, and that orders had been made

for his examination in proceedings supplemental to execution, and that upon attempts to serve such orders the debtor could not be found at his residence or usual place of business, he should be adjudicated a bankrupt. *Brock v. Hoppock*, 2 N. B. R. 2; Fed. Cas. 1,912.

### (d) *General Assignment.*

See ASSIGNMENTS, I.

8. The making of a voluntary general assignment by a debtor is an act of bankruptcy of itself. In *re Croft Brothers*, 17 N. B. R. 324; 6 N. Y. Wkly. Dig. 218; 8 Biss. 188; 10 Chi. Leg. News, 204; 6 Amer. Law Rep. 597; Fed. Cas. 3,404.

9. An assignment for the benefit of creditors with preferences under a state statute is an act of bankruptcy for which the assignor could be adjudged a bankrupt and the property administered in the bankrupt court. *Roose v. King*, 108 U. S. 379.

10. An assignment of a debtor's property to prevent it falling into the hands of an assignee in bankruptcy and being distributed under the provisions of the bankrupt act is an act of bankruptcy. In *re Randall et al.*, 3 N. B. R. 4; Deady, 557; 2 Amer. Law T. Rep. Bankr. 69; 1 Chi. Leg. News, 209; Fed. Cas. 11,551.

11. Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud and hinder the creditor, and is an act of bankruptcy under section 39 of the act of 1867. It also comes under the description of a conveyance to defeat or delay the operations of the bankrupt act. In *re Langley*, 1 N. B. R. 155.

12. A general assignment for the benefit of creditors, without preference, is an act of bankruptcy, and the assignor's intent to defeat the provisions of the bankrupt act will be conclusively presumed. In *re Smith*, 3 N. B. R. 98; 4 Ben. 1; 3 Amer. Law T. 7; 1 Amer. Law T. Rep. Bankr. 147; Fed. Cas. 12,974.

13. A general assignment for the benefit of creditors, although without preference and untainted by fraud, is an act of bankruptcy; and the fact that the creditors have offered to assent to such assignment upon condition that the assignee be changed will not estop

them from proceeding in bankruptcy. In re Spicer et al. v. Ward & Trow, 8 N. B. R. 127; Fed. Cas. 13,241.

14. A trader knowing himself to be insolvent made a general assignment without preferences, and ten months afterward filed a petition in bankruptcy. Because of the assignment, which constituted an act of bankruptcy, the discharge was refused. In re Goldschmidt, 8 N. B. R. 41; 3 Ben. 379; Fed. Cas. 5,520.

15. An assignment of all a debtor's property, whereby its conversion into money and its distribution among his creditors is given over to a trustee of his own selection, is an act of bankruptcy. Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311; 8 Chi. Leg. News, 258; 4 Amer. Law Rec. 652; 13 Alb. Law J. 305; Fed. Cas. 5,486.

16. The defective execution of a voluntary assignment does not prevent its being an act of bankruptcy. In re Lawrence et al., 18 N. B. R. 516; 26 Pittsb. Leg. J. 143; Fed. Cas. 8,133.

17. An assignment, although so defective as to be void under state laws, is an act of bankruptcy. In re Mendelsohn, 12 N. B. R. 533; 3 Sawy. 342; Fed. Cas. 9,420.

18. An assignment by a debtor of all his property for the benefit of all his creditors, under the laws of Iowa, is an act of bankruptcy, and though not void *ab initio*, is subject to be avoided by proceedings under the bankrupt act of 1867. Cragin, Ass., v. Thompson, 12 N. B. R. 81; 2 Dill 513; Fed. Cas. 3,320.

19. A debtor who, having made an assignment for the benefit of his creditors, retains, through the agency of the assignee, a portion of the estate, and converts it to his own use, to an amount greater than he would be entitled to hold under the exemption laws, is guilty of an act of bankruptcy. Farrin v. Crawford et al., 2 N. B. R. 181; 7 Chi. Leg. News, 343; Fed. Cas. 4,686.

20. Creditors who have obtained a preference by a bill of sale from the debtor are estopped to set up the execution of the same as an act of bankruptcy. Those who have taken possession of the entire property under a general assignment or bill of sale, intended to prefer them, cannot set up the non-payment of a note as an act of bankruptcy. In re Williams, 14 N. B. R. 182; Fed. Cas. 17,706.

21. Where a debtor makes an assignment of his property for the benefit of all his creditors, with intent to secure an equal distribution of all his property among his creditors, it is not necessarily a conveyance of the property with intent to defeat or delay the operation of the bankrupt act. In re Marter, 12 N. B. R. 185; Fed. Cas. 9,143.

(e) *Mortgage.*

22. A fraudulent chattel mortgage on a bankrupt's stock of goods, to secure an alleged debt, made with intent to delay, hinder and defraud creditors, is a sufficient act of bankruptcy to warrant an adjudication. In re McKibben, 12 N. B. R. 97; Fed. Cas. 8,859.

(f) *Payment.*

23. Although made in the usual course of business, a payment by an insolvent debtor is an act of bankruptcy. In re Oregon P. & P. Co., 18 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

24. Payments made by a debtor to petitioning creditors are material facts on the issue in denial of bankruptcy, and the debtor may introduce evidence thereof without special traverse of the amount of indebtedness. In re Skelley, 5 N. B. R. 214; 3 Biss. 260; Fed. Cas. 12,921.

25. To take the property of an insolvent firm to pay a debt which is not a partnership debt, but for which each of the partners is liable, is an act of bankruptcy. In re Matot et al., 16 N. B. R. 485; 5 N. Y. Wkly. Dig. 529; Fed. Cas. 9,282.

26. If a bank certifies the check of a debtor in advance, relying on his promise to make his account good during the day, such an overdraft, in the absence of fraud, creates simply the relation of debtor and creditor, and the payment of such a debt after insolvency occurs is an act of bankruptcy. Payne et al. v. Solomon, 14 N. B. R. 162; Fed. Cas. 10,856.

27. Payment of wages to employees, in contemplation of insolvency, is an act of bankruptcy. The preferred wages of an employee must be secured through proceedings in bankruptcy. In re Kenyon et al., 6 N. B. R. 238.

28. A company, being insolvent, paid its rent in full, in order to prevent the forfeiture of a valuable lease. *Held* a technical act of bankruptcy. In re Merchants' Ins. Co., 6 N. B. R. 48; 3 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

29. A petition in bankruptcy was filed by a creditor against certain debtors. It was thereupon arranged that said creditor be paid in full, and his attorney was employed to induce the other creditors to settle their claims, some on one basis and others on another, the intention being not to consummate the settlements until, by their simultaneous execution, every creditor would be bound and prevented from objecting. *Held*, that this was an act of bankruptcy and *per se* an intent to prefer. Curran v. Munger, 6 N. B. R. 33; Fed. Cas. 3,487.

#### (g) *Removal of Property.*

30. An allegation that the defendant, in contemplation of bankruptcy, consigned goods to a consignee residing beyond the jurisdiction of the court, is a sufficient charge that the removal was made to defraud creditors if it were in fact done with intent to keep the property from coming into the hands of the assignee. In re Hammond v. Coolidge, 8 N. B. R. 71; 1 Lowell, 881; Fed. Cas. 5,999.

#### (h) *Suspension of Commercial Paper.*

31. The only act of bankruptcy alleged in the petition was a stoppage and fourteen days' suspension of payment upon a single piece of commercial paper. *Held*, a *prima facie* act of bankruptcy under the act of 1867. In re McNaughton, 8 N. B. R. 44; Fed. Cas. 8,912; Heinsheimer et al. v. Shea & Boyle, 8 N. B. R. 46; 2 Amer. Law T. 107; 1 Chi. Leg. News, 345; 16 Pittsb. Leg. J. 85; Fed. Cas. 6,328.

32. The respondent, being a merchant, suspended payment of his commercial paper for a period of fourteen days. *Held* an act of bankruptcy under the act of 1867. In re Wilson, 8 N. B. R. 396; 5 Chi. Leg. News, 549; 5 Leg. Op. 153; 21 Pittsb. Leg. J. 22; Fed. Cas. 17,780.

33. Under the act of 1867 a suspension of payment for fourteen days is an act of bankruptcy, although no fraud is alleged or proved; and where such suspension is on commercial paper of a firm, the fact that the partnership has been previously dissolved cannot be offered as a defense by the retiring partner. In re Weikert et al., 8 N. B. R. 5; Fed. Cas. 17,361.

34. Under the act of 1867 suspension and non-resumption of payment of commercial paper need not be fraudulent to constitute an act of bankruptcy; but if such suspension be without adequate legal excuse, it is within the meaning of the bankrupt law. In re Thompson et al., 8 N. B. R. 45; 2 Biss. 166; 16 Pittsb. Leg. J. 85; 2 Amer. Law T. 107; 1 Chi. Leg. News, 345; 1 Amer. Law T. Rep. Bankr. 137; Fed. Cas. 13,936.

35. A suspension of payment of his commercial paper by a solvent trader, and non-resumption of such payment within a period of fourteen days, is *per se* fraudulent, and is an act of bankruptcy under the act of 1867. Hardy et al. v. Biningier et al., 4 N. B. R. 77; Fed. Cas. 6,057.

36. In charging the jury as to suspension, as constituting an act of bankruptcy under section 89 of the act of 1867, the court instructed that such suspension must be fraudulent and not through accident or mistake. In re Hollis et al., 8 N. B. R. 82; Fed. Cas. 6,621.

37. Suspension and non-resumption of payment of commercial paper within fourteen days, to constitute an act of bankruptcy under the act of 1867, must be fraudulent. In re Davis, 8 N. B. R. 89; 3 Ben. 482; Fed. Cas. 3,615.

38. Non-payment of the commercial paper of a merchant or trader at maturity, and the continuous suspension and neglect of payment, is a continuous act of bankruptcy under the act of 1867. In re Raynor, 7 N. B. R. 527; 11 Blatch. 43; 1 Amer. Law Rec. 736; Fed. Cas. 11,597.

39. The failure of an accommodation indorser to pay the note for fourteen days after his liability has been duly fixed is an act of bankruptcy, under the act of 1867, if there be no defense to the note in the hands of its holder, and if the indorser be a manufact-

urer. In re Chandler, 4 N. B. R. 66; 1 Lewell, 478; Fed. Cas. 2,591.

40. An indorser of a note who, being a merchant, manufacturer or trader, does not, within fourteen days of protest and notice, make provision for the payment of his liability thereon, commits an act of bankruptcy, under the act of 1867, and the fact that the note was indorsed for accommodation is immaterial. In re Clemens, 8 N. B. R. 279; 5 Chi. Leg. News, 511; 8 Amer. Law Rev. 168; Fed. Cas. 2,878.

41. Under the act of 1867, a suspension of payment for more than fourteen days, of a promissory note given by a trader in the course of business, is an act of bankruptcy, even though, prior to such suspension, the trader had gone out of business. Davis et al. v. Armstrong, 3 N. B. R. 7; 2 Amer. Law T. 138; Fed. Cas. 3,624.

42. Where the maker of a note requested the holder to hold the note for a day, and this was done for forty days, the note does not lose its character as commercial paper, and the non-payment by the maker, who was a merchant, was an act of bankruptcy under the act of 1867. Perin & Goff Mfg. Co. v. Peale, 17 N. B. R. 377; Fed. Cas. 10,981.

43. Under the act of 1867, if a merchant or trader suspend payment of his commercial paper for fourteen days, it is an act of bankruptcy of which any creditor may avail himself, notwithstanding the paper on which payment was suspended is taken up before the petition is filed. In re Ess and Clarendon, 7 N. B. R. 138; 3 Biss. 301; 4 Chi. Leg. News, 357; 20 Pittsb. Leg. J. 84; 2 Md. Law Rep. 353; 1 Amer. Law Rec. 356; 6 Alb. Law J. 277; 6 West. Jur. 447; Fed. Cas. 4,530.

44. A executed a promissory note. Subsequently, but before it became due, he became the owner of a mill. He did not pay the note at maturity, and after suspending fourteen days a petition in involuntary bankruptcy was filed. Objection made because he was not in one of the classes named in the act of 1867 at the time the note was made. Held immaterial, and he was adjudged bankrupt. In re Carter, 6 N. B. R. 299; 3 Leg. Op. 221; 6 Amer. Law Rev. 755; 3 Biss. 195; 4 Chi. Leg. News, 187; Fed. Cas. 2,470.

45. A petition was filed under the act of

1867 alleging various acts of bankruptcy. Certain mortgages had been given, and the court found that they were given when the debtor was insolvent, and with intent to delay and hinder creditors, and that he had suspended payment upon his commercial paper and had not resumed in fourteen days. The adjudication was made. In re Cowles, 1 N. B. R. 42; 1 West. Jur. 367; Fed. Cas. 3,297.

46. The allegation of stoppage and suspension of payment on a certain day, upon commercial paper made and dated within six months next preceding the filing of the petition, combined with the allegation that payment had been demanded at different times and refused, is equivalent to an allegation of a demand for payment on that day, and adjudication of the bankrupt will be granted under the act of 1867. In re Chappel, 4 N. B. R. 176; Fed. Cas. 2,612.

47. A specification setting forth suspension of payment of commercial paper as an act of bankruptcy, under the act of 1867, should state the date of the note or bill of which payment was stopped, to whom made, for what amount, when payable, whether the debtor's liability thereon was as maker or indorser, and by whom the same was held when payment was neglected or refused. In re Randall et al., 3 N. B. R. 4; Deady, 557; 2 Amer. Law T. Rep. Bankr. 69; 1 Chi. Leg. News, 209; Fed. Cas. 11,551.

48. A merchant who stops the payment of his commercial paper cannot prevent the running of the fourteen days necessary to make this stoppage an act of bankruptcy (act of 1867), by the execution of an assignment for the benefit of all his creditors, previous to the expiration of said period. In re Laner, 9 N. B. R. 494; Fed. Cas. 8,055.

### (i) *Transfer of Property.*

49. If a debtor intend by his act to delay, hinder or defraud his creditors, or to give a preference to any of them, or to defeat or delay the operation of the bankrupt act, he clearly commits an act of bankruptcy, however innocent the act of the preferred creditor or the person to whom the transfer is made. In re Drummond, 1 N. B. R. 10; 1 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 4,093.

50. Any fraudulent conveyance, assignment, sale, gift or other transfer of lands, etc., by a merchant or trader was an act of bankruptcy under the act of 1841, notice of which to a creditor would avoid a conveyance in his favor. *Shawhan v. Wheritt*, 7 How. 627.

51. In order to prove that a sale was made in contemplation of bankruptcy, evidence may be given of a prior sale by the same party, accompanied by a secret agreement which re-invested the seller with the ownership of a share of the property so sold. *Rosenthal v. Walker*, 111 U. S. 185.

52. An insolvent debtor, being pressed by creditors, conveyed land, for which he paid \$8,000, to his wife and brother-in-law, in payment of \$2,500 which he had received from them. *Held*, an act of bankruptcy. *Thornhill & Co. v. Link*, 8 N. B. R. 521; Fed. Cas. 13,993.

53. A purchaser of goods who assumes debts of the vendor as part consideration, and sells the goods leaving the debts unpaid, which the vendor is compelled to discharge, commits an act of bankruptcy and is liable to the vendor for the amount of the debts assumed. *In re Phelps v. Clasen*, 8 N. B. R. 22; *Woolw. 204*; 2 West. Jur. 221; Fed. Cas. 11,074.

54. The issue at par of stock of a company, not theretofore issued in payment of the *bona fide* debt of the company, does not operate to the prejudice of creditors or work a fraud upon them. If, however, the stock be owned by the company as paid-up stock lawfully acquired by it, it would probably be regarded as ordinary property, and if disposed of by the authorized act of the corporation to creditors under such circumstances as to give them an illegal preference, such act would be one of bankruptcy. *Winter v. Iowa, M. & N. P. R. R. Co.*, 7 N. B. R. 289; 2 Dill. 487; 6 West. Jur. 562; 5 Chi. Leg. News, 74; 6 Alb. Law J. 358; Fed. Cas. 17,390.

## II. WHAT ARE NOT.

### See ASSIGNMENTS, II.

#### (a) *Mortgage.*

55. A mortgage for money to pay debts ratably would not be an act of bankruptcy, even in a trader. *In re Union P. R. R. Co.*,

10 N. B. R. 178; 6 Chi. Leg. News, 355; 8 Amer. Law Rev. 779; 31 Leg. Int. 261; Fed. Cas. 14,376.

56. An act of bankruptcy, as contemplated by section 39 of the act of 1867, is not committed when a railroad corporation gives a mortgage of all its franchises, lands and other property to secure the equal payment of its unsecured indebtedness. *Id.*

57. A petitioning creditor alleged that his debtor had transferred property with intent to delay his creditors; the answer and proof showed that mortgages were given to secure a loan to enable him to relieve his stock in business from an attachment and to continue business. *Held*, that as the mortgages were based on a present consideration, and were neither given nor received with intent to delay creditors, they did not constitute an act of bankruptcy. *In re Sanford*, 7 N. B. R. 352; Fed. Cas. 12,310.

58. Where a deed of trust executed December 8, 1866, by a bankrupt who did not file his petition till June 8, 1867, was not recorded until March 2, 1867, *held*, that the recording within four months of the commencement of bankruptcy proceedings was not an act of bankruptcy, for the deed was operative from its date, and the act of the creditors in recording it was not the act of the bankrupt. *In re Wynne*, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

59. A petition was filed against a minor who had committed an alleged act of bankruptcy by giving, with intent to prefer, a chattel mortgage to secure a claim, and who, after becoming of age, filed a petition of voluntary bankruptcy, in which he confirmed the former proceedings and asked the benefit of the bankrupt act. *Held*, that the proceedings while he was an infant were void, and that his confirmation did not operate as affirmation of the debt on which they were based. *In re Derby*, 8 N. B. R. 106; 6 Ben. 232; 6 Alb. Law J. 422; Fed. Cas. 3,815.

#### (b) *Suspension of Commercial Paper.*

60. The suspension of payment by a manufacturing company and non-resumption of payment within fourteen days does not of itself constitute an act of bankruptcy under



the act of 1867. In re Jersey City W. G. Co., 1 N. B. R. 118; 7 Amer. Law Reg. (N. S.) 419; 1 Amer. Law T. Rep. Bankr. 61; Fed. Cas. 7,292.

61. A suspension of payment of commercial paper for fourteen days is not, in the absence of fraud, an act of bankruptcy under the act of 1867. In re Leeds, 1 N. B. R. 138; 25 Leg. Int. 140; 1 Amer. Law T. Rep. Bankr. 78; 7 Amer. Law Reg. (N. S.) 693; 6 Phila. 468; 15 Pittsb. Leg. J. 361; Fed. Cas. 8,205.

62. Unless fraudulent, a stoppage and non-resumption of payment of commercial paper for fourteen days is not an act of bankruptcy under the act of 1867. If the act be fraudulent, this must be alleged distinctly in the petition and affidavits. If fraud be not alleged, an order to show cause should be refused. In re Cone et al., 2 N. B. R. 21; 2 Ben. 502; Fed. Cas. 3,095.

63. Mere stoppage and non-resumption of payment, in the absence of fraud, for fourteen days, is not sufficient to constitute an act of bankruptcy under the act of 1867, nor is fraud inferable therefrom. Gillies v. Stone et al., 2 N. B. R. 10.

64. The non-payment of a single piece of commercial paper is not an act of bankruptcy under the act of 1867, as there is a defense to it; but where such suspension is chronic, or there is an inability to meet notes as they mature, there is such a suspension as the law contemplates; and even though there may be but a single piece of paper fourteen days past due, the maker may be adjudged bankrupt. McLean et al. v. Brown et al., 4 N. B. R. 188; Fed. Cas. 8,880.

65. In a mercantile community the non-payment of a note at maturity by the maker, who is a merchant or trader, is *prima facie* evidence of insolvency, and warrants a decree in bankruptcy (act of 1867). In an agricultural community the rule is different, and no man is suspected of being insolvent from the fact alone that his notes are not paid at maturity. Shaffer v. Fritchery et al., 4 N. B. R. 179; Fed. Cas. 12,697.

66. A mere accommodation indorser cannot, under the act of 1867, be adjudged bankrupt for non-payment of such paper. In re Clemens, 9 N. B. R. 57; 2 Dill. 533; 21 Pittsb. Leg. J. 30; Fed. Cas. 2,877.

67. It is no act of bankruptcy, under the act of 1867, for a debtor to suspend payment

of commercial paper for fourteen days, when at the time of such suspension he was enjoined by the bankrupt court from making any transfer or disposition of his property. In re Pratt, 9 N. B. R. 47; 6 Ben. 165; 21 Pittsb. Leg. J. 82; Fed. Cas. 11,369.

68. Under the act of 1867 a debtor cannot be said to have suspended payment of his commercial paper when he refuses payment of a note because he believes that he has a good defense, if it also appear that he is a person of property, engaged in business; that he has not suspended payment of his debts and commercial paper generally, and that suit on the said note is pending in a state court. In re Manheim, 7 N. B. R. 342; 6 Ben. 270; Fed. Cas. 9,038.

69. Where a party shows there is reasonable doubt of his liability on a note for the non-payment of which his adjudication in bankruptcy is sought, accompanied with evidence of a condition of solvency in fact and the payment of all other just claims and commercial paper, and showing that the non-payment complained of was because he did not owe the debt, and that no demand had ever been made for the payment upon him, a court of bankruptcy should dismiss the petition. In re Munn, 7 N. B. R. 468; 3 Biss. 442; 7 Amer. Law Rev. 751; Fed. Cas. 9,925.

70. The suspension referred to in the bankruptcy act (1867) is a general suspension of commercial paper, and not the refusal to pay paper in respect to which liability is denied, and the bankrupt court will not sit to try the validity of the reasons alleged for the non-payment of the paper in respect to which the liability is denied. In re Hercules M. L. Assur. Soc., 6 N. B. R. 388; 6 Ben. 35; 6 Alb. Law J. 358; Fed. Cas. 6,402.

71. Suspension of payment of commercial paper, and non-resumption for fourteen days, is not an act of bankruptcy under the act of 1867 when the debtors have secured extensions from all but one of their creditors. Doan v. Compton, 2 N. B. R. 183; Fed. Cas. 3,940.

72. The non-payment of promissory notes that are not commercial paper is no ground for the adjudication of a debtor as an involuntary bankrupt under the act of 1867. In re Lowenstein et al., 2 N. B. R. 99; 1 Chl. Leg. News, 123; Fed. Cas. 8,574.

73. The McD. P. B. Co. gave their promissory notes as a loan payable to the order of W., and also a receipt or due-bill payable to B. The petitioner set up that the respondents suspended payment for fourteen days. *Held*, the instruments referred to did not comprise commercial paper as intended by the thirty-ninth section of the bankruptcy act of 1867. In re McDermott Patent Bolt Co., 3 N. B. R. 33; 3 Ben. 369; Fed. Cas. 8,750.

74. In the absence of any demand of payment, it is not an act of bankruptcy, under the act of 1867, to have failed for forty days to pay a note payable one day after date. In re Wolf, 17 N. B. R. 423; 4 Sawy. 168; Fed. Cas. 17,923.

75. A debtor who had ceased to be a trader executed a note for a debt created when he was a trader. The payee filed a petition in bankruptcy against the debtor on the ground that, being a trader, he had fraudulently stopped payment of his commercial paper. *Held*, that the non-payment was not an act of bankruptcy under the act of 1867, as the law requires that the debtor be a trader at the time of making the note. In re Jack, 13 N. B. R. 296; 4 Amer. Law Rec. 453; 1 Woods, 549; Fed. Cas. 7,119.

76. After dissolution of the firm, a solvent partner, closing it up as soon as discovered unprofitable, gave to one of the creditors who had assisted in starting and dissolving the firm, and by way of settlement, notes which, at the time of the filing of the petition, were overdue more than fourteen days. *Held*, under the act of 1867, not a suspension of commercial paper, the defendant not being a merchant. In re Weaver, 9 N. B. R. 132; Fed. Cas. 17,307.

77. Under the act of 1867 a debtor does not commit an act of bankruptcy who stops payment of his commercial paper long before the passage of a bankrupt act and does not resume thereafter. *Mendenhall v. Carter*, 7 N. B. R. 320; Fed. Cas. 9,426.

### (c) *Transfer of Property.*

78. Suffering a sale to take place from inability to resist is not an act of bankruptcy, even if by so doing one creditor be preferred to another. *Rankin et al. v. Florida, etc.*

R. R. Co., 1 N. B. R. 196; 1 Amer. Law T. Rep. Bankr. 85; Fed. Cas. 11,567.

79. An instrument which purports to transfer accounts, but which bears no revenue stamp, is void and does not constitute an act of bankruptcy. *Welch v. Dunham*, 2 N. B. R. 9; 2 Ben. 438; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 4,143.

80. An unexecuted agreement by a railroad company to transfer certificates of stock is not an act for which it can be forced into bankruptcy. *Winter v. Iowa, M. & N. P. R. R. Co.*, 7 N. B. R. 289; 2 Dill 487; 6 West. Jur. 562; 5 Chi. Leg. News, 74; 6 Alb. Law J. 358; Fed. Cas. 17,890.

81. On proceedings in bankruptcy against a firm alleging that a conveyance made by one of the partners of his individual property was intended to defraud or give a preference to firm creditors, *held* not an act of bankruptcy by the firm, and that the proceeding must be against the conveying partner alone. In re Redmond & Martin, 9 N. B. R. 408; Fed. Cas. 11,633.

82. Where a stock of goods was sold to a *bona fide* purchaser, and there is no evidence that the vendor was insolvent at the time, but it appearing on the trial that the purchaser had previously tried to buy the stock, and that the vendor had refused, but finally sold because he wished to change his business, *held*, that an adjudication would not be made on an involuntary petition setting up the sale of the stock as the only act of bankruptcy. In re Valliquette, 4 N. B. R. 92; Fed. Cas. 16,823.

## ADJOURNMENT.

### I. POWER OF.

### II. EFFECT OF.

### III. FAILURE TO TAKE.

### IV. INTERVENTION.

### V. APPEARANCE AFTER.

See COSTS AND FEES, 122; EVIDENCE, 7; EXAMINATION OF BANKRUPT, 55; MEETINGS, 5, 7; REFEREE, 2, 17, 18.

### I. POWER OF.

1. Registers, with the exercise of proper legal discretion, have entire control over proceedings pending before them, including the

power to grant or refuse adjournments and postponements. In *re Hyman*, 2 N. B. R. 107; 3 Ben. 28; 36 How. Pr. 282; Fed. Cas. 6,984.

2. Where, on due return of warrant by marshal in a case of involuntary bankruptcy, bankrupts asked for further time to prepare schedules, as the number of creditors and non-adjustment of accounts had prevented their completion, the register should have adjourned to a day certain. In *re Schepeler et al.*, 3 N. B. R. 42; 3 Ben. 346; Fed. Cas. 12,452.

3. When a party is aggrieved by the register's ruling on his application to prove his right to vote, the court may re-open the meeting and adjourn it, and provide for the determination of questions of the right to vote before the final vote is taken. In *re Spencer*, 18 N. B. R. 199; Fed. Cas. 18,229.

4. A warrant was issued in a case returnable on the 15th of September, but because of yellow fever the register was prevented from attending at that time. He made orders of adjournment and forwarded them to his assistant, he being absent from the city. *Held*, that the register had no authority to so adjourn a meeting and a new warrant must issue. In *re Dickinson*, 18 N. B. R. 514; 26 Pittsb. Leg. J. 143; Fed. Cas. 3,895.

## II. EFFECT OF.

5. The examination of the bankrupt may be adjourned beyond the return day of the order to show cause why the discharge should not be granted. Such adjournment necessarily operates as an enlargement of the time for the examination of the bankrupt, and should not be granted except for good cause shown. In *re Mawson*, 1 N. B. R. 41; 1 Amer. Law T. Rep. Bankr. 46; Fed. Cas. 9,320.

6. If there be an adjournment the witness must be paid for another day's attendance before he is bound to attend on the adjourned day. In *re Griffin*, 1 N. B. R. 83; 2 Ben. 209; Fed. Cas. 5,810.

7. A defendant who, on return day of rule to show cause why he should not be adjudged a bankrupt, appears but neither files plea, demurrer or demand for trial by jury, but obtains a continuance, is not entitled on the day to which the case is continued to demand trial of issues by a jury, but the court may permit plea to be filed and to be tried by the court. In *re Sherry*, 8 N. B. R. 142.

8. There can be only one first meeting, and all adjournments are a continuance of the same. If objection to the appointment of an assignee is made at that stage, it is considered as continuing, and the register cannot appoint unless the objection is actually withdrawn. In *re Norton*, 6 N. B. R. 297; Fed. Cas. 10,348.

## III. FAILURE TO TAKE.

9. Where parties to bankruptcy proceedings appear on the return day, or adjourned day, and join issue, and no further proceedings or adjournment is had, the case is to be considered as pending from day to day until disposed of. In *re Buchanan*, 10 N. B. R. 97; Fed. Cas. 2,073.

## IV. INTERVENTION.

10. The adjourned day on which, if the petitioning creditor does not appear and proceed to an adjudication, another creditor may appear and prosecute, is any day to which the proceedings on the order to show cause may be adjourned for the purpose of inquiring into the allegations of the acts of bankruptcy. In *re Lacey, Downs & Co.*, 10 N. B. R. 477; Fed. Cas. 7,965.

## V. APPEARANCE AFTER.

11. An appearance for a creditor in opposition to the discharge entered on the adjourned day of the hearing on the order to show cause is not too late. In *re Seabury*, 10 N. B. R. 90; Fed. Cas. 12,578.

## ADJUDICATION.

- I. PETITION FOR.
- II. PARTIES.
- III. VACATION.
- IV. IN GENERAL.

See APPEAL AND WRIT OF ERROR, 1; ATTORNEY, 7; DISCHARGE, 164; EXEMPTIONS, 112; FRAUD, 1-5; INJUNCTION, 72; INSANITY, 4; LIENS, 69; PARTNERS, 26, 30, 47; PETITIONS, 69; PLEADING AND PRACTICE, 61.

### I. PETITION FOR.

1. Proceedings instituted by creditors were dismissed before adjudication. Afterward, without further notice, the proceed-

ings were reinstated against one debtor. *Held*, that such reinstatement is without authority and an adjudication following it is void. *Gage et al. v. Gates*, 15 N. B. R. 145.

2. Where one partner filed a voluntary petition, it is not necessary to adjudication of the firm that there should be an act of bankruptcy. In *re Noonan*, 10 N. B. R. 330; 3 Biss. 491; 5 Chi. Leg. News, 557; Fed. Cas. 10,292.

3. Adjudication relates back to time of filing petition, and notes sold by bankrupt before adjudication and after filing can be recovered. In *re Lake*, 6 N. B. R. 542; 3 Biss. 204; Fed. Cas. 7,992.

4. A debtor commits act of bankruptcy when he filed voluntary petition for adjudication, and a creditor cannot resist by proof that debtor is really able to pay debts. In *re Fowler*, 1 N. B. R. 680 (8vo. ed.).

5. A debtor will not be adjudicated a bankrupt simply because, after selling his property for the purpose of going into a new business, he does not put the proceeds into tangible shape to prevent the same being seized on process issued out of a state court. *Fox v. Eckstein*, 4 N. B. R. 123; Fed. Cas. 5,009.

6. In answer to an order to show cause, the burden is on the respondent to prove that the facts in the petition are not true, in order to defeat an adjudication of bankruptcy. In *re Price et al.*, 8 N. B. R. 514; Fed. Cas. 11,411.

7. An adjudication of bankruptcy is not conclusive evidence, as against an execution creditor, as to the allegations in the petition found to be true by such decree. In *re Dunkle et al.*, 7 N. B. R. 72; Fed. Cas. 4,160.

8. An adjudication and assignment thereunder relate back to the filing of the petition and vest the property of the bankrupt, as of the date of such filing, in the assignee (act of 1867). In *re Coulter*, 5 N. B. R. 64; 2 Sawy. 42; 1 Amer. Law T. Bankr. 257; 3 Chi. Leg. News, 377; 4 Amer. Law T. 131; Fed. Cas. 3,276.

9. As all creditors are parties to and are bound by proceedings that are regular, an adjudication and proceedings which are not made and carried on within the proper jurisdiction should be set aside. In *re Fogarty et al.*, 4 N. B. R. 148; 1 Sawy. 233; Fed. Cas. 4,895.

10. Adjudication of bankruptcy may be made against one partner only upon joint

debt. In *re Melick*, 4 N. B. R. 26; Fed. Cas. 9,399.

11. An attaching creditor, though not a party to proceedings, may contest adjudication, on the ground that the requisite number and amount of creditors have not joined in the petition. In *re Hatje*, 12 N. B. R. 548; 6 Biss. 436; Fed. Cas. 6,215.

## II. PARTIES.

12. The rights of parties in a proceeding in bankruptcy are fixed at the date of adjudication. In *re Kerr et al.*, 9 N. B. R. 566; Fed. Cas. 7,729.

13. An existing adjudication in bankruptcy precludes all inquiry touching the validity of the debt of a petitioning creditor. In *re Fallon*, 2 N. B. R. 92; 1 Chi. Leg. News, 107; Fed. Cas. 4,628.

14. The assignee in bankruptcy of a mortgagor stands in the position of a judgment creditor, the adjudication being equivalent to recovery of judgment and a levy. *Miller, Ass., v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,576.

15. Before petition for adjudication was filed, execution was issued and a levy was made on the real estate of the judgment debtor sufficient to satisfy the debt. *Held*, that the creditor was not estopped from proceeding in the bankrupt court, but the levy was held to be waived. In *re Sheehan*, 8 N. B. R. 345; Fed. Cas. 12,737.

## III. VACATION.

16. A creditor who had not proved his claim moved to set aside the adjudication of bankruptcy against his debtor. *Held*, that his interest entitled him to be heard. In *re Derby*, 8 N. B. R. 106; 6 Alb. Law J. 422; 6 Ben. 232; Fed. Cas. 3,815.

17. An order to show cause why adjudication should not be set aside, because act of bankruptcy charged was committed more than six months before filing petition. The court on review so ordered. In *re Raynor*, 7 N. B. R. 527; 11 Blatchf. 48; Fed. Cas. 11,597.

18. An order to show cause why proof of a debt against a bankrupt should not be vacated and canceled must be made by the court. *Comstock v. Wheeler*, 2 N. B. R. 171; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 8,084.

19. In an action in a state court brought by an assignee to recover property, averring title in himself by virtue of his appointment, the defendant set up its purchase from the bankrupt, and denied that he was a bankrupt or had ever been legally adjudicated. *Held*, that defendant was entitled to establish that the adjudication was void, and plaintiff's demurrer overruled. *Stuart v. Aumuller*, 8 N. B. R. 541.

20. A petition was filed against the debtor, who made default. Creditors sought to contest the adjudication. *Held*, that they could not, but they might suggest suspicious circumstances, and the court would direct a reference of the petition to take proof of the matters alleged therein. *In re Hopkins*, 18 N. B. R. 396; 26 Pittsb. Leg. J. 120; Fed. Cas. 6,684.

21. The proceeding by a petitioning creditor to force his debtor into bankruptcy is *inter partes*, like an ordinary action at law, and until the adjudication is had they are the only parties. No outside creditor has a right to resist the adjudication or to ask that it be annulled. *In re Bush*, 6 N. B. R. 179; 6 West. Jur. 274; Fed. Cas. 2,222.

22. Bankrupt was adjudicated June, 1878. Creditor petitioned to vacate adjudication March, 1879. *Held*, that she was put on inquiry by notice of adjudication, and failure to make inquiries was evidence of acquiescence. *In re Meade*, 19 N. B. R. 335; Fed. Cas. 9,870.

23. Upon a voluntary petition alleging that the bankrupts composed the firm of G. & W. they were adjudicated. Two years later it was held that one A. was a general partner in the firm. Afterwards a petition was filed to set aside the adjudication. *Held*, that as rights of other parties had arisen under and adapted to it, the application should be denied. *In re Griffith et al.*, 18 N. B. R. 510; 36 Pittsb. Leg. J. 140; Fed. Cas. 5,820.

24. In an application for an order annulling the adjudication no notice was served on the bankrupt himself. *Held*, this objection vital. *In re Bush*, 6 N. B. R. 179; 6 West. Jur. 274; Fed. Cas. 2,222.

25. Where the record shows jurisdiction, an adjudication cannot be assailed in a collateral action. *Sloan v. Lewis*, 12 N. B. R. 173; 22 Wall 150.

#### IV. IN GENERAL.

26. Without the entry of an order of adjudication a debtor cannot be considered as having been adjudged bankrupt. *In re Hill*, 10 N. B. R. 133; 1 Amer. Law T. Rep. (N. S.) 421; 20 Int. Rev. Rec. 81; Fed. Cas. 6,484.

27. The petition, the adjudication and the assignment vest the assets in the assignee as a trust, against which the statute of limitations ceases to run. *In re Eldridge et al.*, 12 N. B. R. 540; 2 Hughes, 256; 1 N. Y. Wkly. Dig. 243; Fed. Cas. 4,331.

28. An adjudication sweeps within the purview of the bankrupt court all property of the debtor, whether incumbered or not, and no steps can thereafter be taken to enforce claims against the property, except through the bankrupt court, or by its permission in the state court. *In re Hufnagel*, 12 N. B. R. 554; Fed. Cas. 6,837.

29. The adjourned day on which, if the petitioning creditor does not appear and proceed to adjudication, another creditor may appear and prosecute, is any day to which the proceedings on the order to show cause may be adjourned for inquiring into the allegations of the acts of bankruptcy. *In re Lacey et al.*, 10 N. B. R. 477; Fed. Cas. 7,965.

30. Where a petitioner in bankruptcy fails to attend before the register on the day fixed in the order of reference, he may, nevertheless, be adjudicated a bankrupt within a reasonable time thereafter. *In re Hatcher*, 1 N. B. R. 91; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 6,210.

31. Where it is proved that the bankrupt has been imprisoned but seven days exclusive of the first day, this of itself is not sufficient to support an adjudication of bankruptcy under the act of 1867. *Hunt et al. v. Pooke et al.*, 5 N. B. R. 161; Fed. Cas. 6,896.

32. Order of adjudication only takes effect from time it was produced in court and promulgated. *In re Boston H. & E. R. R. Co.*, 6 N. B. R. 222; 9 Blatchf. 409; Fed. Cas. 1,678.

33. An adjudication of bankruptcy is not a conclusive finding which tends to defeat the jurisdiction of the court over the bankrupt. *In re Goodfellow*, 3 N. B. R. 114; 1 Lowell, 510; 3 Amer. Law T. Rep. Bankr. 69; 1 Amer. Law T. Rep. Bankr. 179; Fed. Cas. 5,536.

34. By adjudication the bankrupt's property becomes exempt from subsequent attachment on mesne process. *Williams v. Merritt*, 4 N. B. R. 706 (8vo. ed.).

### ADMINISTRATION.

See ESTATES.

### ADMINISTRATOR.

See COSTS AND FEES, 95; PARTNERS, 189.

### ADMISSION.

1. Even when a debtor has signed a written admission that the requisite quorum has united in the petition, the court must still be satisfied that the admission is made in good faith. In *re Flanagan*, 18 N. B. R. 439; 36 Pittsb. Leg. J. 128; Fed. Cas. 4,850.

2. A petition was accompanied by a paper purporting to be signed by debtor to the effect that the "debtor admits that the requisite number and amount of his creditors have joined in the petition," etc. *Held*, that the absence of the allegation as to the number and amount of the creditors in the petition is not supplied by the admission of the debtor presented, and that, even after such admission is made in writing, the court must be satisfied that the admission was made in good faith. In *re Keeler*, 10 N. B. R. 419; 20 Int. Rev. Rec. 82; Fed. Cas. 7,638.

### ADVANCES.

See LIENS, 124; PREFERENCES, 266, 267; TRUST, 1; WAGES, 2.

### ADVERTISEMENT.

See NOTICE, IX.

### AFFIDAVITS.

See EXAMINATION OF BANKRUPT, 75; PETITION, VIII.

1. Affidavits must be correctly entitled in the cause in which they are used, otherwise an indictment for perjury would not lie upon

them if false. In *re Walther & Walther*, 14 N. B. R. 273; Fed. Cas. 17,126.

2. Affidavits taken under the act of 1867 before notaries public could not be read in matters pending before a United States bankruptcy court. In *re McKibben*, 13 N. B. R. 97; Fed. Cas. 8,859.

3. Register has power to take affidavit and deposition in cases not before him at any time after petition filed. In *re Deane*, 3 N. B. R. 29; Fed. Cas. 3,700.

### AFFIRMATIONS.

See OATHS.

### AGENT.

I. BANK.

II. CLAIM.

III. BAILMENT.

IV. IN GENERAL.

See BANKS, 40; CLAIMS, 13, 22; DEFINITIONS, 3; DISCHARGE, 290, 294; FIDUCIARY DEBT, 3; ESTATES, 232; PETITION, 119; PREFERENCE, 197; SET-OFF, 13; TRUSTEE, 54.

### I. BANK.

1. Certain stocks were sold by J. C. & Co. as brokers, the proceeds being deposited in a bank and regularly entered in the brokerage books of account. At the failure of J. C. & Co. there remained in the bank to their credit more than enough to pay the brokerage accounts. Suit being brought for the proceeds, judgment was awarded the complainant. *Voight v. Lewis, Trustee*, 14 N. B. R. 543; 11 Phila. 511; 33 Leg. Int. 402; 9 Chi. Leg. News, 65; 11 Bankers' Mag. (3d S.) 481; 3 N. Y. Wkly. Dig. 421; 24 Pittsb. Leg. J. 54; Fed. Cas. 16,989.

2. At law a principal may maintain an action to recover from a bank the proceeds of a discount of his note which were placed to the credit of his agent, and which the bank at the time of the deposit had no notice it did not belong to the agent. *Id.*

### II. CLAIM.

3. Proof of debt may be made by an agent who knows all the facts required to be sworn

to in proving it, the creditor himself having no personal knowledge thereof. In *re Watrous et al.*, 14 N. B. R. 258; 3 N. Y. Wkly. Dig. 130; R. S. 5078; Fed. Cas. 17,270.

4. Motion was made to dissolve injunction on grounds that bill was not sworn to by petitioning creditor, but by agent; that circuit court had jurisdiction, and that debtor had been adjudicated a bankrupt, and that such adjudication dissolved the injunction. *Held*, affidavit of agent sufficient; that under the act of 1867 district courts have jurisdiction, and that section 40 is not applicable to such injunctions as might be granted between the time of the commencement of proceedings and date of adjudication. In *re Fendley*, 10 N. B. R. 250; 8 Amer. Law Rec. 105; Fed. Cas. 4,728.

5. Where a creditor places his claim in the hands of a collection agent, the creditor is not chargeable with the knowledge of a sub-agent employed by the latter, if he does not receive the proceeds of a judgment obtained by him, although the proceeds are remitted to the collection agent. *Hoover, Ass. etc., v. Wise et al.*, 14 N. B. R. 264; 91 U. S. 308.

6. An attorney employed by a collection agent is the agent of the agent and not of the creditor who employed the agent. *Id.*

7. Where one constituted attorney for the collection of a debt procured from the debtor a judgment note for the amount in his own name, and entered it, knowing that the debtor was insolvent, there being an intent to give a preference, though the fact of insolvency was not directly known to the real creditors, such knowledge is imputable to them and the judgment is invalid. *Vogle v. Lathrop*, 4 N. B. R. 146; 3 Pittsb. Rep. 268; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,985.

8. To allow an agent to make proof of debt on the ground that the authority from his principal, who is not prevented from testifying, is ample, is to declare that creditors hold the provision of the act entirely at their discretion. In *re Whyte*, 9 N. B. R. 267; Fed. Cas. 17,606.

9. Mere absence from the state where the proof is made is not regarded as cause for proof by an agent. In *re Jackson et al.*, 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

10. If the contracts for the sale of grain were liable to the taint of illegality, it does not follow that a contract by one of the principals to secure moneys advanced by their agent to pay losses resulting from those transactions is contaminated with the same vice. *Clark, Ass. etc., v. Foss et al.*, 17 N. B. R. 261; 7 Biss. 540; Fed. Cas. 2,852.

11. Agent knew that debtor was insolvent, and that the notes on which judgment was recovered were executed in fraud of the bankrupt act. It was held that the knowledge of the agent bound his principal. *Sage, Jr., v. Wynkoop, Ass.*, 16 N. B. R. 363; Fed. Cas. 12,215.

12. "An agent holding negotiable paper cannot prove it under objection, excepting in the name of the real owner, and therefore not at all when the owner is in a situation to make the proof himself." In *re Saunders*, 13 N. B. R. 164; 2 Lowell, 444; Fed. Cas. 12,371.

### III. BAILMENT.

13. Bankrupt purchased hides with money furnished by claimant under an agreement by which the hides were to be manufactured into leather by the former, the money being remitted by draft, and a portion of the hides concerning which the litigation arose was purchased with the proceeds of drafts which the claimant refused to accept. It was held that the title to the goods was in the claimant. *Safford et al. v. Burgess, Ass.*, 16 N. B. R. 402; Fed. Cas. 12,213.

14. If the consignee is at liberty to sell at any price and to receive payment at any time, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, the relation is not that of principal and agent. In *re Chamberlaines*, 12 N. B. R. 230; 2 Hughes, 264; 14 Amer. Law Reg. (N. S.) 638; 4 Amer. Law Rec. 304; Fed. Cas. 4,855.

15. A. was B.'s agent for the manufacture of iron. B. was to own the iron, which was to be sold, and the proceeds, after paying B. certain sums, was to be divided unequally between A., B. and C. A. sold the iron with knowledge of B. and failed to turn over to A. the moneys due him. It was held that the agency was more of a partnership than

an agency, and the relations of A. and B. were not of the fiduciary relation comprehended by section 83 of the act of 1867. *Baker v. Sterling, Jr.*, 17 N. B. R. 218.

16. The lien of a factor for money advanced for his commissions and charges is protected by the bankrupt law. In *re Roseberry et al.*, 16 N. B. R. 340; 8 Biss. 112; Fed. Cas. 12,052; 5128, R. S.

#### IV. IN GENERAL.

17. It is not requisite that an agent of creditors in bankruptcy proceedings shall set forth the authority by which he acts. In *re California Pac. R. R. Co.*, 11 N. B. R. 193; 3 Sawy. 240; 2 Cent. Law J. 79; Fed. Cas. 2,315.

18. A married woman did business in her own name by her husband acting as her agent, who managed the same in his discretion. She became unable to pay her debts and was adjudged bankrupt. *Held*, the acts of the husband as agent of the bankrupt, his knowledge and intentions, are the acts, knowledge and intentions of the bankrupt. *Graham, Ass.*, v. Stark, 3 N. B. R. 92; 3 Ben. 520; Fed. Cas. 5,676.

19. The doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted. It must be knowledge acquired in the transaction of the business of his principal, or in a prior transaction then present to his mind, and which could be communicated to his principal. *Hoover, Ass. etc.*, v. Wise et al., 14 N. B. R. 264; 91 U. S. 308.

20. Previous to the issuing of an order to show cause it is essential to show proof of agency, where the particular act of signing the petition was done by agent. But supplementary proof may, in the discretion of the court, be received *nunc pro tunc* to establish the authority of the agent to sign the petition. In *re Rosenfield*, 11 N. B. R. 86; 3 Amer. Law Rec. 724; 1 Cent. Law J. 583; Fed. Cas. 12,061.

21. It is not necessary in the purchase of goods by an agent that he give in payment the identical money received from the principal, in order to vest title in the latter. *Safford et al. v. Burgess, Ass.*, 16 N. B. R. 402; Fed. Cas. 12,218.

22. Though there be no actual fraud of the agent, yet if he makes a false representa-

tion as to a matter peculiarly within his own knowledge or that of his principal, such principal, though innocent, cannot take the benefit of the transaction. *Id.*

23. The agent of a debtor who was seeking to effect a composition obtained the same by making false representations. It was held that creditors were not bound by their agreement, although the debtor might not have authorized the false statements. *Elfelt v. Snow*, 6 N. B. R. 57; 2 Sawy. 94; Fed. Cas. 4,342.

24. A factor who retains money of his principal is not a fiduciary debtor within the act of 1841. *Chapman v. Forsyth*, 2 How. 202.

25. A power of attorney authorizing a person to appear for a creditor is not required to be acknowledged. In *re Powell*, 2 N. B. R. 17; Fed. Cas. 11,354.

#### AGREED CASE.

See CERTIFICATION.

#### ALIEN.

I. JURISDICTION OVER.

II. IN GENERAL.

See CLAIMS, 59; COURTS, 123.

#### I. JURISDICTION OVER.

1. The bankrupt act gives no jurisdiction over a member of a firm who resides in Canada, though the firm business be carried on in New York. In *re Burton et al.*, 17 N. B. R. 212; 9 Ben. 324; Fed. Cas. 2,214.

2. The law cannot be enforced as to an alien beyond the territorial limits of the United States; but for a violation of its provisions within the United States, if the courts obtain jurisdiction of the violators of the law, they may enforce its provisions, although they be aliens. *Olcott, Ass.*, v. MacLean et al., 14 N. B. R. 379.

3. If a debtor transfers property in the United States to prefer an alien creditor, the latter is liable to an action by the assignee of the bankrupt in a court of the United States. *Id.*



## II. IN GENERAL.

4. If the United States holds a claim against a firm of which some of the partners are aliens, it may claim priority of payment out of the estate of the individual partners, without first resorting to the partnership effects. *Lewis, Trustee, v. United States*, 14 N. B. R. 64; 93 U. S. 618.

5. An alien resident within the United States may take the benefit of the bankrupt law, and need not have resided within the district in which application is made for period of six months. *In re Goodfellow*, 8 N. B. R. 114; 1 Lowell, 510; Fed. Cas. 5,536.

## ALIMONY.

A claim for alimony is not a provable debt, and proceedings to enforce its payment cannot be stayed by the bankrupt court. *In re Lachemeyer*, 18 N. B. R. 270; 18 Alb. Law T. 242; Fed. Cas. 7,966.

## AMENDMENT.

### I. TO PETITION.

- (a) *In General.*
- (b) *Partners.*

### II. TO SPECIFICATIONS OF OBJECTIONS.

### III. TO SCHEDULE.

### IV. GENERALLY.

See CONVEYANCE, 16; PARTNERS, 60; PETITIONS, 69, 104, 117, 129; PREFERENCES, 51; SCHEDULE, 87; STATUTORY CONSTRUCTION, 86, 70, 71.

### I. TO PETITION.

#### (a) *In General.*

1. When a petition averred that acts were committed by the bankrupt in contemplation of bankruptcy and insolvency, and evidence of insolvency only is given, the petition should be amended accordingly. *In re Houghton*, 1 N. B. R. 121; Fed. Cas. 6,223.

2. A creditor, after his claim has been duly proved, has a right to ask that petitioner amend any defect in his petition or schedule. *In re Jones*, 2 N. B. R. 20; Fed. Cas. 7,447.

3. The court has jurisdiction when a petition is filed, notwithstanding the insufficiency of verification, and therefore power

to allow amendment. *In re Simmons*, 10 N. B. R. 253; Fed. Cas. 12,864.

4. Amendment that would introduce into petition new acts of bankruptcy will not be allowed. *In re Crowley*, 1 N. B. R. 137.

5. A petition that a debtor may be declared a bankrupt, if defective, may be amended after argument and before the judgment of the court therein. *In re Waite et al.*, 1 N. B. R. 84; 1 Lowell, 207; Fed. Cas. 17,044.

6. A petition in bankruptcy was filed by a creditor not representing one-fourth in number and one-third in amount of the creditors, after the amendment of 1874, but when neither the creditor nor the court had reliable information as to the amendment. The petition was dismissed, it being held that other creditors could unite by amendment only in cases commenced before the amendatory act. *In re Burch*, 10 N. B. R. 150; Fed. Cas. 2,138.

7. A petition in bankruptcy was filed. It appeared that the debtor, being insolvent, suffered his property to be taken on legal process with intent to give a preference, which act he might have prevented by going into bankruptcy. An adjudication of bankruptcy would have been rendered but for the fact that the petition did not allege the act of sufferance to have been done when the debtor was insolvent. An amendment of the petition was allowed. *In re Craft*, 1 N. B. R. 89; 2 Ben. 214; Fed. Cas. 3,316.

8. A petition in bankruptcy alleged that a corporation had suspended payment of its commercial paper and had not resumed within fourteen days. There was no allegation that the suspension and non-resumption were fraudulent. The adjudication as asked was refused, and the petition was allowed to be amended by inserting the word "fraudulent." *In re Jersey C. W. G. Co.*, 1 N. B. R. 113; 7 Amer. Law Reg. (N. S.) 419; 1 Amer. Law T. Rep. Bankr. 61; Fed. Cas. 7,292.

9. It was not intended that the statute permitting amendments to petitions should allow creditors, who have recklessly sworn to a petition knowing it to be false, to then have others join in and carry it on. *In re Keiler et al.*, 18 N. B. R. 10; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 7,647.

10. The district court, in allowing amendments to petitions, should be governed by the

same principles as those which govern the allowance of amendments in similar cases in other courts, but amendments which would introduce entirely new acts of bankruptcy will be disallowed. In *re Reed et al.*, 1 N. B. R. 137; 1 Amer. Law T. Rep. Bankr. 79; Fed. Cas. 11,644.

11. Special reasons are required for the allowance of amendments in sworn petitions, or in other pleadings which are required to be verified by the oath of the party; and where the object is to introduce new facts or to change essentially the grounds of the prosecution or defense, the courts are disinclined to allow such amendments except for very special reasons, and in cases where they are clearly required in furtherance of justice, and are applied for without unreasonable delay. *Id.*

12. It should be satisfactorily shown that the allegations sought to be added by an amended petition are probably if not certainly true; that they are material; that the party has been guilty of no gross negligence; that the mistakes to be corrected or the new facts to be alleged have been ascertained since the original petition was sworn to, and that the application to amend was made without unnecessary delay. *Id.*

#### (b) *Partners.*

13. One partner filed a petition against his copartner, but omitted to state the residence of his copartner. It was held that such omission might be supplied by amendment. In *re Vanderhoef et al.*, 18 N. B. R. 543; Fed. Cas. 16,841.

14. A bankrupt may amend his petition after adjudication so as to bring in his copartner in order to effect a discharge of copartnership debts. In *re Little*, 1 N. B. R. 74; 2 Ben. 86; 15 Pittsb. Leg. J. 268; Fed. Cas. 8,390.

### II. TO SPECIFICATIONS.

15. Incomplete specifications in opposition to a discharge in bankruptcy may be amended. In *re McIntire*, 1 N. B. R. 115; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 8,823.

### III. TO SCHEDULE.

16. Material additions to the schedule of debts or of property are not allowable by

way of amendment after the first meeting of creditors, except upon such conditions as may prevent injustice. In such cases the issuing of an alias warrant will be required. In *re Ratcliffe*, 1 N. B. R. 98; 25 Leg. Int. 92; 6 Phila. 466; 1 Amer. Law T. Rep. Bankr. 47; 15 Pittsb. Leg. J. 343; Fed. Cas. 11,578.

17. The bankrupt sought to amend his schedule by adding to the list twenty other debts. The court held that there had been culpable laxity, and refused to allow the amendment, except upon such terms as should prevent injustice to creditors. In *re Morgenthal*, 1 N. B. R. 98; 28 Leg. Int. 92; 6 Phila. 468; Fed. Cas. 9,818.

18. When there has been culpable laxity, an amendment to the schedule will not be permitted to be made by the bankrupt. *Id.*

19. Bankrupt may amend his schedules even after the consideration of specifications in opposition to his discharge. In *re Preston*, 3 N. B. R. 27; Fed. Cas. 11,892.

20. An application of a bankrupt to amend his schedules is an *ex parte* one and the register has power to allow him to do so. In *re Watts*, 2 N. B. R. 145; 3 Ben. 166; Fed. Cas. 17,293.

21. Counsel for the bankrupt presented a proposed amendment introducing six judgment creditors. The first meeting of creditors had been held. The register reported that the amendment should be made conditioned upon the issuing of a new warrant. The court accepted the register's report. In *re Ratcliffe*, 1 N. B. R. 98; 25 Leg. Int. 92; 6 Phila. 466; 1 Amer. Law T. Rep. Bankr. 47; 15 Pittsb. Leg. J. 343; Fed. Cas. 11,578.

### IV. GENERALLY.

22. The bankrupt court possesses discretionary power as to allowing proofs of debt to be amended. In *re Parkes*, 10 N. B. R. 83; Fed. Cas. 10,754.

23. To the end that justice may be done to all parties, great latitude of amendment will be permitted up to discharge in bankruptcy. In *re Pierson*, 10 N. B. R. 193; Fed. Cas. 11,154.

24. An amendment by which assignee was made a plaintiff two years did not have effect to relate back and thereby defeat statute of limitations. *Cogdell, Ass., v. Exum*, 10 N. B. R. 327.

25. Every court has power to alter and amend its records during the term to which the record relates; and an appellate court is bound to presume that evidence in support of amendment was sufficient. The jurisdiction of the circuit court is revisory, and a party cannot come there to make his case in the first instance. *Ala. & Chatt. R. R. Co. v. Jones*, 7 N. B. R. 145; *Fed. Cas.* 127.

26. The court has discretion to permit amendments to be made at any time. It is discretion limited to same cause of action, and should not permit new causes of action under guise of amendment. *In re Leonard*, 4 N. B. R. 182; *Fed. Cas.* 8,255.

### ANSWER.

See PLEADING AND PRACTICE, XV, (g).

## APPEALS AND WRITS OF ERROR.

### I. IN GENERAL.

#### II. TO CIRCUIT COURT.

#### III. TO SUPREME COURT.

See CLAIMS, 29, 159; COMPOSITION, 23; DISCHARGE, 215; PLEADING AND PRACTICE, 206, 212, 218; TRUSTEE, 103.

### I. IN GENERAL.

1. The bankruptcy of a party, though adjudged before his taking an appeal, will not prevent its prosecution in his name, and the appeal may be heard either in the name of the bankrupt or his assignee. *O'Neil v. Dougherty*, 10 N. B. R. 294.

2. A writ of error from a decree rendered against a bankrupt sued out by his assignee is a suit within the meaning of the act of the law and must be brought within two years. *Jenkins v. Bank*, 106 U. S. 571.

3. The failure to give notice to an assignee in bankruptcy of an appeal from a decree in his favor is fatal to the appeal in proceedings under section 5081, Revised Statutes, for a re-examination of a claim filed against the bankrupt's estate. *Ex parte Meade*, 109 U. S. 230.

4. A claim of immunity under section 711, Revised Statutes, from the operation of a de-

creed by a state court, where the defendant became a bankrupt during the pendency of the suit, and his assignee was made a party and appeared in his stead, presents a federal question on which a writ of error may be taken. *Winchester v. Heiskell*, 119 U. S. 450.

5. If a defendant be adjudged bankrupt after he has taken an appeal, an affirmance of the judgment, in the absence of a suggestion of his bankruptcy, is not a nullity. *Flanagan v. Pearson*, 14 N. B. R. 87.

6. Where notice of appeal is filed in due time, the period for filing the transcript may be enlarged by stipulation. *Baldwin, Ass., v. Rapplee*, 5 N. B. R. 19; *Fed. Cas.* 802.

7. A petition for revision of a decree of the United States district court in the United States circuit court must be filed within ten days from the entry of the order or decree sought to be revised, unless the time is enlarged by leave of the court (act of 1867). *Sweatt v. Boston, H. & E. R. R. Co.*, 5 N. B. R. 234; 3 *Cliff.* 339; 1 *Amer. Law T. Rep. Bankr.* 273; 4 *Amer. Law T.* 174; 6 *Amer. Law Rev.* 168; *Fed. Cas.* 13,684.

8. Where an appeal is taken by one of the lien creditors in open court during the term in which the decree appealed from is rendered, no citation of other parties is necessary. *Milner, Jr., v. Meek, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

9. A discharge obtained pending an appeal cannot be pleaded in an appellate court. Such court takes cognizance only of the matters appearing on the record of the court below. *Serra é Hijo v. Hoffman & Co.*, 17 N. B. R. 124.

10. An assignee in bankruptcy may appeal from an award of arbitrators under the compulsory arbitration law without the payment of costs. *Morss v. Gritmann, Ass.*, 10 N. B. R. 182.

11. An appeal by one of two parties against whom a joint decree is rendered will be dismissed unless the record show that the other party has been notified in writing to appear and has failed, or has refused to join. *Masterson, Ass., v. Howard et al.*, 5 N. B. R. 180; 18 *Wall.* 99.

12. A case wrongfully appealed should be dismissed, except where such dismissal would give full force and effect to an irregular and

erroneous decree of the subordinate court, entered in a case over which the court has no jurisdiction and in violation of legal and constitutional rights. *Stickney, Ass., v. Wilt*, 11 N. B. R. 97; 23 Wall. 150.

13. The court overlooked specifications filed by a creditor and granted a discharge without considering them. The court held it was a proper subject of review by the circuit court (act of 1867). In *re Buchstein*, 17 N. B. R. 1; 9 Ben. 215; Fed. Cas. 2,076.

14. An appeal to the appellate court cannot be used to give a party a second trial, but only for re-examination and revision of rulings, orders and decrees. In *re Dow*, 6 N. B. R. 10; Fed. Cas. 4,036.

15. The burden of proof is upon the petitioner for review to show error in the decision appealed from. *Id.*

## II. TO CIRCUIT COURT.

16. In reviewing a decision of the district court on a question of fact, it is for the petitioner to satisfy the court that a wrong decision has been arrived at. In *re Mooney*, 15 N. B. R. 456; 14 Blatchf. 204; Fed. Cas. 9,748.

17. Appeal is not the proper method to take a question arising in a case in bankruptcy to circuit court, and is not provided for by bankrupt act (1867). In *re Reed*, 2 N. B. R. 2; Fed. Cas. 11,638.

18. Effect of appeal to United States circuit courts (act of 1867). *Benjamin, Ass., v. Hart*, 4 N. B. R. 138; 4 Ben. 454; Fed. Cas. 1,302; In *re Place et al.*, 4 N. B. R. 178; 8 Blatchf. 302; Fed. Cas. 11,200; In *re Casey*, 8 N. B. R. 71; 10 Blatchf. 376; Fed. Cas. 2,495; In *re York et al.*, 4 N. B. R. 156; Fed. Cas. 18,189; In *re Alexander*, 3 N. B. R. 6; Chase, 295; Fed. Cas. 160; In *re Kyler*, 3 N. B. R. 11; 6 Blatchf. 514; Fed. Cas. 7,957; *Ruddick v. Billings*, 3 N. B. R. 14; Woolw. 380; Fed. Cas. 12,110; *Mead v. Thompson*, 8 N. B. R. 529; 15 Wall. 635; *Scammon, Ass., v. Cole et al.*, 5 N. B. R. 257; 8 Cliff. 472; Fed. Cas. 12,432; *Sampson, Ass., v. Blake et al.*, 6 N. B. R. 401; Fed. Cas. 12,284.

19. On appeal to circuit court from an order disallowing proof of debt against the estate of a bankrupt, *held*, that the claim presented in the circuit court must be the

same that was presented to the district court. In *re Jaycox*, 13 N. B. R. 122; 12 Blatchf. 209; Fed. Cas. 7,237.

20. A court should not do indirectly what it cannot do directly; hence when an appeal has been dismissed in the United States circuit court for being too late, the party cannot apply for a rehearing in the district court in order that upon the re-entering of the decree an appeal may be perfected. In *re Troy W. Co.*, 6 N. B. R. 16; 5 Ben. 413; Fed. Cas. 14,200.

21. An appeal from a district court to the circuit court under the act of 1867 existed only upon a final decree of the court in a suit in equity instituted by, or against, an assignee in bankruptcy, where the sum in controversy exceeded \$500. In *re Zug et al.*, 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 34 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

22. Under the act of 1867, final decrees in suits in equity in the district courts in bankruptcy causes and final judgments in civil actions, where the debt or damages amounted to more than \$500, were re-examinable in the circuit courts. *Knight v. Cheney*, 5 N. B. R. 305; Fed. Cas. 7,883.

23. Where proceedings begun by an assignee in the district court could be treated as a bill in equity, the cause could be appealed to the circuit court and again appealed to the supreme court of the United States (act of 1867). *Milner, Jr., v. Meek, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

24. An appeal was taken from a decree of the district court in bankruptcy within ten days after the decree was filed, but notice to the adverse party was not given within such period. The appeal was dismissed. *Wood v. Bailey, Ass.*, 12 N. B. R. 132; 21 Wall. 640.

25. The circuit court had jurisdiction to review the findings of a jury under instructions from the court upon writ of error (act of 1867). *Knickerbocker Ins. Co. v. Comstock*, 8 N. B. R. 145; 16 Wall. 258.

26. Under the act of 1867, the ten days within which the declaration on appeal was to be filed in the circuit court was directory and not mandatory, and if the requisites of Rev. Stats., secs. 4981, 4982 and 4984, had been

complied with, the circuit court was not deprived of jurisdiction. *Barron et al. v. Morris, Ass.*, 14 N. B. R. 371; *Fed. Cas.* 1,055.

27. On motion to dismiss appeals from district court, *held*, that appeal from order of district court sitting in bankruptcy should be entered in circuit court within ten days after appeal is taken, although circuit court is in session at time order is made and continues so up to end of ten days (act of 1867). *In re McEwen et al.*, 19 N. B. R. 445.

### III. TO SUPREME COURT.

28. No appeal lies to the supreme court from a decision of the circuit court upon a petition to have an adjudication set aside. *Sandusky v. First Nat. Bank*, 12 N. B. R. 176; 23 Wall. 289.

29. Where it appeared that the decision of a question as to the effect of a discharge in bankruptcy upon the right of a party to enforce a lien upon property in existence at the time the proceedings were commenced in bankruptcy was necessarily involved in the decision of a state court, and that such decision was adverse to the rights set up under the discharge, the supreme court took jurisdiction to review the decision. *Long v. Bullard*, 117 U. S. 617.

30. The supreme court cannot review the action of the circuit courts in the exercise of their supervisory jurisdiction, under the bankrupt law. *Wiswall et al. v. Campbell et al., Ass.*, 15 N. B. R. 421; 93 U. S. 347.

31. The jurisdiction intended to be conferred by the bankrupt act on the United States district and circuit courts is the regular jurisdiction between party and party, as described in the judiciary act and article 3 of the constitution; therefore final judgments or final decrees, rendered in cases where the matter in dispute exceeds, exclusive of costs, the sum of \$2,000, may be re-examined in the supreme court, under section 22 of the judiciary act, by writ of error or appeal. *Coit v. Robinson et al.*, 9 N. B. R. 289; 19 Wall. 274.

32. The question was as to whether an appeal lay to the supreme court of the United States from a decree of the circuit court rendered in the exercise of the super-

visory jurisdiction conferred upon that court by the first clause of the second section of the bankrupt act of 1867. *Held*, that no appeal lay. *Id.*

33. Where a party appeals from the decision of the United States circuit court to the supreme court, the allowance of the appeal is to relate back to the time when the original application was made for an appeal to a judge of the circuit court, and entitles a party to a stay of proceedings. *Thornhill v. Bank of Louisiana*, 5 N. B. R. 377; *Fed. Cas.* 18,991.

34. In cases of appeal, the appeal may be taken orally in court; no written application need be made either in court or to the judge. *Id.*

35. Upon a petition to review the circuit court reversed a decree setting aside a certain lien, the assignee meanwhile having filed a plea denying the supervisory jurisdiction of the circuit court. On appeal to the supreme court, the assignee pleaded that the cause could only be removed to the circuit court on appeal, and that an appeal would not lie to the supreme court respecting a petition of review. It was so held, and the circuit court's decree was reversed. *Stickney, Ass., v. Witt*, 11 N. B. R. 97; 23 Wall. 150.

36. Creditor appealed to the circuit court from the decision of the district court granting a discharge, and prayed the circuit judge "to review the said decision and reverse the same, and for such further order and relief in the premises as to the court may seem just," the circuit court affirming the decree of the district court. On appeal to the supreme court, *held*, that the decree of the circuit court was final (act of 1867). *Mead v. Thompson*, 8 N. B. R. 529; 15 Wall. 635.

37. An appeal was taken to the supreme court of the United States from a decision of the circuit court, rendered in the exercise of supervisory jurisdiction of decisions in the district court, on proceedings in bankruptcy of a summary character. *Held*, that appeal would not lie (act of 1867). *Hall v. Allen*, 9 N. B. R. 6; 12 Wall. 452.

38. The supreme court of the United States has jurisdiction to review the decision of a state court against an assignee in bankruptcy claiming certain property as belong-

ing to him under the bankrupt act. *Williams v. Heard*, 140 U. S. 529.

39. The supreme court, under the act of 1867, had jurisdiction on writ of error to a state court of a controversy involving a dispute as to the validity of the transfer by a trustee in bankruptcy and the question involving the limitation prescribed by the bankrupt act. *Traer v. Clews*, 115 U. S. 523.

40. Under the act of 1841 an appeal did not lie to the supreme court from a decree of a district court. *Crawford v. Points*, 18 Howard, 11.

### APPEARANCE.

See ATTORNEY; COMPOSITION, 107; DISCHARGE, III; MEETINGS, 1, 12, 14, 17; PLEADING AND PRACTICE.

### APPRAISEMENT.

An appraisement was set aside as exaggerated. No satisfactory evidence existed of depreciation between date of adjudication and sale of goods by assignee. Their sale not having realized fifty per cent. of proved debts, discharge was refused. *In re Borden & Geary*, 5 N. B. R. 128; 5 Ben. 228; Fed. Cas. 1,654.

### ARBITRATION.

1. An assignee in bankruptcy may appeal from an award of arbitrators and without payment of costs, the adverse party having taken out the rule of reference. *Morss v. Gritmann, Ass.*, 10 N. B. R. 132.

2. Where by stipulation a claim is submitted to the register to hear and determine, it is not a reference or an arbitration under the New York code, and the register's decision is not conclusive. *In re Ford et al.*, 18 N. B. R. 426; Fed. Cas. 4,932.

3. Bankrupts and alleged creditors entered into a stipulation referring a dispute over creditors' claims to the register. The creditors claimed that the decision of the register was final. *Held*, that it was not competent for creditors and bankrupt to submit the question of the amount due to arbitration. *Id.*

### ARREST.

#### I. ON NON-DISCHARGEABLE DEBT.

#### II. BEFORE BANKRUPTCY.

##### (a) *In General.*

##### (b) *Habeas Corpus.*

#### III. UNDER PROVISIONAL WARRANT.

#### IV. IN VOLUNTARY CASES.

#### V. AFTER COMPOSITION.

#### VI. IN GENERAL.

See ACTS OF BANKRUPTCY, 6; CONSTITUTIONAL LAW, 81; COURTS, 268; CRIMES AND OFFENSES, 5; DISCHARGE, 206, 269, 294; ESTATES, 178; EXAMINATION OF BANKRUPT, 63; JUDGMENT, 22, 34; PROOF OF CLAIMS, 34.

#### I. ON DEBT NOT DISCHARGED.

1. A sheriff will not be enjoined from an arrest of a bankrupt on execution pursuant to a judgment recovered on a debt created by fraud. *In re Patterson*, 1 N. B. R. 58; 2 Ben. 155; 15 Pittsb. Leg. J. 241; Fed. Cas. 10,817.

2. A bankrupt arrested on an execution issued on a judgment in an action for deceit is not entitled to be relieved from the arrest pending the proceedings in bankruptcy. *In re Whitehouse*, 4 N. B. R. 15; Fed. Cas. 17,564.

3. When a court of bankruptcy has no power to discharge a judgment, it cannot interfere to prevent its enforcement by imprisonment, unless necessary to the exercise of its jurisdiction. *In re Pettis*, 2 N. B. R. 17; 7 Amer. Law Reg. (U. S.) 695; Fed. Cas. 11,046.

4. A bankrupt, pending proceedings in bankruptcy, was arrested in a civil action upon process issued from a state court in an action of false and fraudulent misrepresentations. *Held*, the bankruptcy court had no jurisdiction to order his discharge from custody. *In re Devoe*, 2 N. B. R. 11; 1 Lowell, 251; 7 Amer. Law Reg. (U. S.) 690; 1 Amer. Law T. Rep. Bankr. 90; Fed. Cas. 3,848.

5. A bankrupt is liable to arrest, pending bankruptcy proceedings, upon a debt created by his defalcation of the proceeds of goods sent to him to be sold on commission and for which he refuses to account. *In re Kimball*, 2 N. B. R. 74; a. c. affirmed, 2 N. B. R. 114; 2 Ben. 554; Fed. Cas. 7,768.

6. An order of arrest made by a state court in a suit against a bankrupt upon an affidavit showing that the suit was founded on a debt created by fraud of the bankrupt will not be vacated by the bankruptcy court, but the suit will be stayed until the final determination of the bankruptcy proceedings. *In re Migel*, 2 N. B. R. 158; Fed. Cas. 9,588.

7. A bankrupt who is held in arrest and bail in a judgment in a civil action founded upon a debt created by fraud will not be discharged from custody by the court in which bankruptcy proceedings are pending, although the judgment debtor may have proved his debt in the proceedings. *In re Robinson*, 2 N. B. R. 108; 6 Blatchf. 258; 86 How. Pr. 176; 2 Amer. Law T. Rep. Bankr. 18; Fed. Cas. 11,939.

8. Upon order to show cause why a debtor should not be adjudged a bankrupt, it appeared that a chattel mortgage on the debtor's stock of goods had been given with intent to hinder, delay and defraud creditors. *Held*, that an order of arrest will not be granted, where the facts as to concealment of goods are based upon information and belief alone. *In re McKibben*, 12 N. B. R. 97; Fed. Cas. 8,859.

## II. BEFORE BANKRUPTCY.

### (a) *In General.*

9. A debtor arrested in a civil action, prior to commencement of proceedings in bankruptcy, is not entitled to be released from such arrest upon being adjudged a bankrupt; but if the debt or claim on which the action in which he is arrested is founded is one which a discharge in bankruptcy will release, upon such discharge he will be entitled to release from arrest. *Brandon Nat. Bank v. Hatch*, 16 N. B. R. 468.

10. A. was arrested on meane process issued out of a state court, and imprisoned thereon for a period exceeding seven days. The judge of the state court afterwards decided that the commissioner should not have made the order of imprisonment, and ordered A.'s release on common bail. After A. had been imprisoned seven days, and before his release, a petition in bankruptcy was filed against him. *Held*, that the imprisonment being on an order voidable, and not void,

and no effort having been made within seven days to have it set aside, an act of bankruptcy had been committed under act of 1867. *In re Cohn*, 7 N. B. R. 81; 29 Leg. Int. 309; 5 Chi. Leg. News, 13; 6 Alb. Law J. 276; 20 Pittsb. Leg. J. 29; Fed. Cas. 2,967.

11. A debtor held under an order of arrest, but in the custody of his bail, was subsequently adjudicated a bankrupt and surrendered in discharge of his bail, whereupon an alias execution for his arrest was issued by a state court. *Held*, the arrest under the alias execution not a new arrest, but a continuance of the former arrest, theoretically and practically as if he had never been released on bail. *In re Hazleton*, 2 N. B. R. 12; 1 Lowell, 270; 1 Amer. Law T. Rep. Bankr. 105; Fed. Cas. 6,287.

### (b) *Habeas Corpus.*

#### See HABEAS CORPUS.

12. A debtor was arrested on meane process in an action of tort and committed to jail. Afterward he went into bankruptcy and sought by petition for writ of *habeas corpus* to obtain his release from imprisonment. The court held that the petition must be denied, as the arrest occurred before the filing of the petition in bankruptcy. *In re Walker*, 1 N. B. R. 60; 1 Lowell, 232; Fed. Cas. 17,060.

13. A bankrupt arrested and imprisoned before the proceedings in bankruptcy have commenced cannot be released by the court upon a petition for a writ of *habeas corpus*. *Id.*

## III. UNDER PROVISIONAL WARRANT.

14. The bankrupt act only authorizes the arrest of the debtor under a provisional warrant to secure his attendance at the hearing and adjudication, and no arrest can be made under the warrant after adjudication. A bond given by the debtor to secure his release from an arrest made after adjudication is therefore void. *Usher v. Pease et al.*, 12 N. B. R. 305.

15. In an application for a provisional warrant and order of arrest of the debtor, there should be filed a separate petition supported by affidavits of persons having knowl-

edge of the facts, when the same are not stated in the petition of the petitioner's own knowledge. In re McKibben, 12 N. B. R. 97; Fed. Cas. 8,859.

#### IV. IN VOLUNTARY BANKRUPTCY.

16. The bankrupt law gives no authority for the arrest of a bankrupt in case of voluntary bankruptcy. In re Hale, 18 N. B. R. 335; Fed. Cas. 5,911.

#### V. AFTER COMPOSITION.

17. A bankrupt was arrested under civil process of a state court after confirmation of a composition in the federal court. Plaintiffs alleged that their cause of action was based upon a sale procured by defendant through false representations. *Held*, that the composition satisfied the debt. Bamberg et al. v. Stern, 18 N. B. R. 74.

18. The bankrupt court can protect the bankrupt from an action and arrest under the authority of a state court. In re Williams et al., 11 N. B. R. 145; 6 Biss. 233; 7 Chi. Leg. News, 49; Fed. Cas. 17,700.

#### VI. IN GENERAL.

19. A bankrupt cannot be held in arrest upon a judgment for costs in a proceeding in a state court. In re Borst, 2 N. B. R. 62; 1 Gaz. 18; Fed. Cas. 1,665.

20. A bankrupt arrested on an attachment issued by a commissioner in chancery of a state court in proceedings to discover bankrupt's estate, to satisfy a lien established prior to bankruptcy, will be discharged on application to a United States circuit court. *Ex parte* Taylor, 16 N. B. R. 40; 1 Hughes, 617; 24 Pittsb. Leg. J. 205; Fed. Cas. 13,773.

21. A bankrupt who has been arrested under process of the bankrupt court is intitled to be discharged from arrest, if the cause of action on which the arrest is based is a debt from which a discharge in bankruptcy, if granted, will release him. In re Smith, 18 N. B. R. 24; Fed. Cas. 12,976.

22. Subsequent to final judgment, a stay of a proceeding for the purpose of putting in motion the remedy of arrest reserved to the creditor is not allowable. In re Whitney, 18 N. B. R. 563; Fed. Cas. 17,581.

23. Where an order is in effect a final judgment for the payment of money, whether the proceeding in which it is made is of equitable or legal cognizance, it cannot be enforced by imprisonment upon the theory of contempt. In re Atlantic Mut. Ins. Co., 17 N. B. R. 368; 9 Ben. 337; Fed. Cas. 629.

24. In an action on a bond given on the arrest of a debtor, and conditioned that he will apply for the benefit of the state insolvent laws, a plea of a subsequent discharge of the debtor in bankruptcy is a valid plea, unless the debt is one from which a discharge will not release him. Hubert v. Horter, 14 N. B. R. 430.

25. A United States district court has power to relieve a bankrupt from arrest, on process of a state court, in an action founded upon a debt that may be discharged in bankruptcy, and the question whether the debt is one contracted in fraud may be examined into and determined by it. In re Glaser, 1 N. B. R. 73; 15 Pittsb. Leg. J. 265; 2 Ben. 180; 1 Amer. Law T. Rep. Bankr. 57; Fed. Cas. 5,474.

26. Defendant had been plaintiff's agent in the sale of sewing machines, receiving a commission, and accounting and paying over the balance of sales monthly. Prior to commencement of suit defendant had been adjudicated a bankrupt, and plaintiff had him arrested under a state statute for the balance unpaid. *Held*, that the debt was not contracted in a "fiduciary character," and defendant discharged from arrest. Grover & Baker v. Clinton, 8 N. B. R. 312; 6 Chi. Leg. News, 33; 18 Int. Rev. Rec. 166; 21 Pittsb. Leg. J. 34; Fed. Cas. 5,845.

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#### ASSESSMENT.

See STOCKHOLDERS.

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#### ASSETS.

See ESTATES.

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#### ASSIGNEE.

See TRUSTEE.



**ASSIGNMENTS.**

**I. WHEN ACT OF BANKRUPTCY.**

- (a) *Defects in.*
- (b) *Insolvent Debtor.*
- (c) *Notice.*
- (d) *Voluntary Act.*

**II. WHEN NOT ACT OF BANKRUPTCY.**

- (a) *Equal Distribution of Assets.*
- (b) *Conditional Conveyance.*

**III. RECORD OF.**

**IV. TRUSTEE OR ASSIGNEE IN.**

- (a) *Objection to.*
- (b) *Estate of.*
- (c) *Compensation of.*

**V. COMPOSITION.**

**VI. COURTS, STATE AND UNITED STATES.**

- (a) *State Laws.*
- (b) *United States Laws.*
- (c) *Liens.*
- (d) *Attorneys.*

**VII. INSOLVENCY.**

**VIII. PETITION IN BANKRUPTCY.**

- (a) *Trustee in Bankruptcy.*
  - (1) *May Set Aside.*
  - (2) *Deed to.*
- (b) *Discharge.*

**IX. REVOCATION.**

**X. OF PROPERTY.**

- (a) *Valid When.*
- (b) *By Consent.*
- (c) *Void When.*

See **CONTRACTS**, 12; **COSTS AND FEES**, 8, 11, 64; **DISCHARGE**, 57, 167, 170; **ESTATES**, 74, 79; **EXEMPTION**, 5; **LIEN**, 20; **MARSHAL**, 9; **PETITION**, 157; **PREFERENCES**, 161; **RENT**, 33; **STATE LAWS**, 3.

**I. WHEN ACT OF BANKRUPTCY.**

See **ACTS OF BANKRUPTCY**, I, (d).

(a) *Defects in.*

1. An assignment, although so defective as to be void under state laws, is an act of bankruptcy. In re Mendelsohn, 13 N. B. R. 533; 8 Sawy. 342; Fed. Cas. 9,420.

2. The defective execution of a voluntary assignment does not prevent its being an act of bankruptcy. In re Lawrence et al., 18 N. B. R. 516; 26 Pittsb. Leg. J. 143; Fed. Cas. 8,183.

(b) *Insolvent Debtor.*

3. A general assignment by an insolvent debtor, though made for the benefit of his creditors, is an act of bankruptcy under the act of 1867. In re Langley, 1 N. B. R. 155.

4. A merchant who stops payment of his commercial paper cannot prevent the running of the fourteen days necessary to make this stoppage an act of bankruptcy, by the execution of an assignment previous to the expiration of said period (act of 1867). In re Laner, 9 N. B. R. 494; Fed. Cas. 8,055.

5. Where an insolvent debtor makes an assignment for the benefit of creditors, it is conclusive evidence of an intent to defeat the operation of the bankrupt act. Jackson, Ass., v. McCulloch et al., 18 N. B. R. 283; 1 Woods, 433; 1 N. Y. Wkly. Dig. 534; Fed. Cas. 7,140.

6. Even though a general assignment is made in good faith and without preferences, it is an act of bankruptcy and will prevent a discharge without reference to the time when it is made. In re Kasson, 18 N. B. R. 379; Fed. Cas. 7,617.

7. A general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law. Platt v. Preston et al., 19 N. B. R. 241; Fed. Cas. 11,219.

(c) *Notice.*

8. The trustee and all persons claiming the benefit of a general assignment are chargeable with knowledge of the terms thereof, and the insolvency of the debtor and a purpose on his part to evade the bankrupt law. Jackson, Ass., v. McCulloch et al., 18 N. B. R. 283; 1 Woods, 433; 1 N. Y. Wkly. Dig. 534; Fed. Cas. 7,140.

(d) *Voluntary Act.*

9. Upon its face a voluntary general assignment bears conclusive evidence that the assignor's intention is to prevent the property transferred being distributed under the bankrupt act. In re Kasson, 18 N. B. R. 379; Fed. Cas. 7,617.

## II. WHEN NOT ACT OF BANKRUPTCY.

(a) *Equal Distribution of Assets.*

10. A general assignment was made by insolvent debtors under the New York state law for the benefit of creditors, the same being untainted by fraud either against creditors or against the act. *Held*, that the assignment was valid and that the property would not be turned over to the assignee. *Sedgwick, Ass., v. Place et al.*, 1 N. B. R. 204; 1 Amer. Law T. Rep. Bankr. 97; 84 Conn. 552; Fed. Cas. 12,623.

11. A trust to sell a debtor's property and divide the cash ratably among creditors is an act of bankruptcy; but a mortgage by a railroad company to secure its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion, is not an act of bankruptcy. In re U. P. R. R. Co., 10 N. B. R. 178; 6 Chi. Leg. News, 355; 8 Amer. Law Rev. 779; 31 Leg. Int. 261; Fed. Cas. 14,876.

12. Where a debtor makes an assignment of his property for the benefit of his creditors, with intent to secure an equal distribution of all the debtor's property among his creditors, it is not necessarily a conveyance with intent to defeat or delay the operation of the bankrupt act. In re Marter, 12 N. B. R. 185; Fed. Cas. 9,143.

13. An assignment made for the benefit of all the assignor's creditors equally, in good faith, without fraud or intent to contravene any provision of the bankrupt act, or to hinder or delay creditors, is not a violation of the spirit of the act. *Haas, Ass., v. O'Brien*, 16 N. B. R. 508.

14. An assignment of property for the benefit of all creditors, made in good faith and free from taint of fraud, is not an act of bankruptcy. *Farrin v. Crawford*, 2 N. B. R. 181; 7 Chi. Leg. News, 342; Fed. Cas. 4,686.

15. A general assignment by a debtor of his property for the benefit of his creditors is not an act of bankruptcy, unless made with intent to hinder or defraud his creditors, or defeat the operation of the bankrupt act. *Langley v. Perry*, 2 N. B. R. 180; 8 Amer. Law Reg. (U. S.) 427; 16 Pittsb. Leg. J. 117; 2 Balt. Law Trans. 521; 2 Amer. Law T. Rep. Bankr. 84; Fed. Cas. 8,067.

(b) *Conditional Conveyance.*

16. The assignment described in section 35, act of 1867, is in the nature of a conditional conveyance, the condition being that no petition in bankruptcy shall be filed within six months. In re Cohn, 6 N. B. R. 379; Fed. Cas. 2,966.

## III. RECORD OF.

(a) *Not Necessary.*

17. An assignee in bankruptcy did not record assignment within six months. He filed bill to set aside sheriff's sale of bankrupt's property. The purchasers claimed that the assignee had no right to maintain suit against them. It was held that record not necessary to perfect assignee's title to bankrupt's property. *Davis v. Anderson*, 6 N. B. R. 146; Fed. Cas. 3,623.

18. When an assignee has accepted his appointment, his neglect to take into his own custody the deed of assignment and have the same recorded, knowing that no property passed by the assignment, is no ground for withholding a discharge. In re Pierson, 10 N. B. R. 107; Fed. Cas. 11,153.

## IV. TRUSTEE.

(a) *Objection to.*

19. A deed is not rendered void by the fact that the trustee was a clerk of the assignor, or that he had no property, but was of good character, and no bond was taken; or that the assignment authorized a sale on thirty days' credit. In re Walker, 18 N. B. R. 56; Fed. Cas. 17,063.

(b) *His Estate.*

20. A bank made an assignment under the laws of Pennsylvania. The assignee brought suit on a note payable to the bank. The defendant raised the question of the validity of the assignment, because contrary to the provisions of the bankrupt law. It was held that plaintiffs were entitled to judgment. *Shryock et al., Ass., v. Bashore*, 15 N. B. R. 283-287.

21. An insolvent debtor made a general

assignment for the benefit of all his creditors more than six months prior to proceedings in bankruptcy. The assignee in bankruptcy claimed the right to the property assigned. *Held*, that the general assignment was valid and the assignee could not claim the property. *Mayer et al. v. Hellman, Ass.*, 18 N. B. R. 440; 91 U. S. 496.

22. A general assignment for the benefit of creditors was made, after which proceedings in bankruptcy were instituted, assignor was adjudged a bankrupt and an assignee appointed. *Held*, that the title to property assigned remained in the common-law assignee until assignment was set aside, and did not vest in the assignee by the fact of the adjudication. *Belden, Ass. etc., v. Smith et al.*, 16 N. B. R. 802; Fed. Cas. 1,242.

23. Debtor made an assignment for the benefit of creditors pending proceedings to have him declared a bankrupt. Application was made to have the common-law assignee restrained from transferring any of debtor's property. *Held*, that the assignment was a fraud upon the bankrupt law, and motion to dissolve the injunction denied. *In re Skoll*, 16 N. B. R. 175; 1 Month. Jur. 350; 1 N. W. Rep. (O. S.) 108; 9 Chi. Leg. News, 377; 6 Amer. Law Rec. 15; 1 Tex. Law J. 42; 4 Law & Eq. Rep. 136; 24 Pittsb. Leg. J. 207; Fed. Cas. 12,926.

24. Where property mortgaged remains in possession of bankrupt at the commencement of proceedings, his possession was that of assignee when appointed, and removal of property by mortgagee without consent of assignee was unlawful. *In re Rosenberg*, 3 N. B. R. 18; Fed. Cas. 12,056.

25. A leased a hotel owned by him and assigned this lease to a creditor to secure a debt. *Held*, that the assignee of a lease must take estate subject to the lease, and that the court will protect the creditor. *Meador et al. v. Everett, Ass.*, 10 N. B. R. 421; 3 Dill. 214; Fed. Cas. 9,376.

26. Where an assignment for the benefit of creditors is made more than two years before bankruptcy, the assignee in bankruptcy cannot subject to his administration any assets assumed to be included in the first conveyance. If they were subject to claims of the creditors, the first assignment

operated to convey them, and if not, they are not covered by the assignment in bankruptcy. *Spindle v. Shreve*, 111 U. S. 542.

### (c) *Compensation of.*

27. An assignment was made for the benefit of creditors. Subsequently, on his own petition, the assignor was adjudged a bankrupt and an assignee appointed, whereupon the common-law assignee turned over all the property in his hands, retaining only enough to reimburse himself for payments made on account of collections, for personal services as assignee, and for attorney's fees. *Held*, that he was not entitled to priority for his personal services and attorney's fees. *In re Lains*, 16 N. B. R. 168; 1 N. W. Rep. (O. S.) 116; 6 Amer. Law Rec. 266; 24 Pittsb. Leg. J. 207; Fed. Cas. 7,989.

28. Where a voluntary assignment for the benefit of creditors was set aside only for the reason that proceedings in bankruptcy superseded it, the voluntary assignee is entitled to all reasonable expenses and compensation for his services. *In re Kurth*, 17 N. B. R. 573; Fed. Cas. 7,948.

## V. COMPOSITION.

29. A composition does not discharge the petitioner from debts until composition notes are paid, and a creditor can sue for the original debt, if his note is not paid, and he is entitled to a *pro rata* share under general assignment. *In re Leipziger*, 18 N. B. R. 264.

## VI. COURTS.

### (a) *State Laws.*

30. A made a general assignment under the laws of New York. Afterward he was adjudicated an involuntary bankrupt and an assignment of his estate executed to an assignee in bankruptcy. Assignee in bankruptcy brought an action against the assignee under the state law, for possession of the property. It was held that the first assignment was valid and the assignee could hold the property. *Von Hein, Ass., v. Elkus et al.*, 15 N. B. R. 194.

31. Where under the New York state statute a voluntary assignment was void as against creditors but good against the assignor, there remains no leviable interest in the assignor. In *re Croughwell*, 17 N. B. R. 337; 9 Ben. 360; Fed. Cas. 8,440.

32. A general assignment, under a state law, without preference, is void under the bankruptcy act. *McDonald, Ass., v. Moore et al.*, 15 N. B. R. 26; 8 Ben. 579; 1 Abb. N. C. 53; 23 Int. Rev. Rec. 25; 3 N. Y. Wkly. Dig. 461; 24 Pittsb. Leg. J. 83; Fed. Cas. 8,763.

33. A general assignment for the benefit of creditors under state law, and during the existence of the United States bankrupt act, may be held valid, provided the rights of creditors are not prejudiced. In *re Hawkins et al.*, 2 N. B. R. 122.

34. The question of whether an assignment under a state law is void may be raised in a collateral action. *Shryock and Rhodes, Ass., v. Bashore*, 13 N. B. R. 481; Fed. Cas. 12,820.

#### (b) *United States Laws.*

35. The making of an assignment under the state law prior to adjudication does not affect the jurisdiction of the bankrupt court. *Pool v. McDonald et al.*, 15 N. B. R. 560; 9 Chi. Leg. News, 822; 4 Law & Eq. Rep. 27; 3 Cin. Law Bul. 151; Fed. Cas. 11,268.

#### (c) *Liens.*

36. The assignment of a bankrupt's estate, under the act of 1867, does not dissolve an attachment made more than four months prior to the commencement of proceedings in bankruptcy. *Bowman v. Harding*, 4 N. B. R. 5.

37. A debtor assigned for benefit of creditors, and afterwards judgments were entered against him. He then filed a petition in bankruptcy, and his first assignee was made assignee in bankruptcy, within two months after the judgments were obtained. It was held that the assignment was only void under the bankrupt law as against the assignee, and the property was not subject to the judgment liens, but became that of the assignee. In *re Walker*, 18 N. B. R. 56; Fed. Cas. 17,063.

38. A general assignment was made by a

debtor for the benefit of his creditors. Subsequently creditors recovered judgments against the debtor, and levied on the property in hands of assignee. Later the debtor was adjudged bankrupt. The property was sold under a stipulation, the proceeds to be held subject to the order of the court in bankruptcy. The court held that the title had passed to the assignee by the general assignment, but that the assignee in bankruptcy was entitled to the proceeds. In *re Biesenthal et al.*, 15 N. B. R. 228.

39. Debtors made a fraudulent assignment while solvent to delay creditors. This was done with the assent of several creditors, but others were dissatisfied and obtained judgments. It was held that such judgments were liens on real estate against an assignee in bankruptcy, and by execution on personally where acquired prior to institution of proceedings in bankruptcy. *Johnson, Ass., v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 586; 14 Alb. Law J. 427; Fed. Cas. 7,408.

#### (d) *Attorney.*

40. An assignment made by an insolvent debtor to a creditor whose attorney is also attorney for the bankrupt and for another creditor is *prima facie* fraudulent and void. In *re Meyer*, 2 N. B. R. 187; 1 Chi. Leg. News, 210; Fed. Cas. 9,515.

### VII. INSOLVENCY.

41. Merchants not able to pay their debts in the ordinary course of business are insolvent within the meaning of the act (1867), and assignments of goods to creditors in such case constitute fraudulent preferences. Discharge refused. In *re Louis et al.*, 2 N. B. R. 145; 3 Ben. 153; Fed. Cas. 8,527.

42. A creditor received an assignment from his debtor at a time when it was alleged the creditor knew the debtor was insolvent. It was held that this was a question for the jury to decide. *Ecker v. McAllister*, 17 N. B. R. 42.

43. Where a general assignment is made in fraud of the bankrupt act it may be set aside by proceedings brought within six months. In *re Temple*, 17 N. B. R. 345; 4 Sawy. 62; Fed. Cas. 13,825.

## VIII. PETITION IN BANKRUPTCY.

### (a) *Trustee in Bankruptcy.*

#### (1) May Set Aside.

44. At the suit of the assignee, a general assignment for the benefit of creditors may be set aside. *Jackson, Ass. v. McCulloch et al.*, 18 N. B. R. 283; 1 Woods, 433; 1 N. Y. Wkly. Dig. 534; Fed. Cas. 7,140.

45. A general assignment for benefit of creditors, without giving priority, is superseded by proceedings in bankruptcy. *Dolson et al. v. Kerr*, 16 N. B. R. 405.

46. Assignee in bankruptcy may maintain action against voluntary assignee and intervening execution creditors to avoid assignment and recover avails of property sold by them. *Linder, Ass. v. Lewis et al.*, 19 N. B. R. 445.

#### (2) Deed to.

47. Assignment executed to assignee by register need not be proved before a clerk of the superior court, but register of deeds must record same, when presented with copy of same under seal of clerk of district court and accompanied with proper fees. In re *Neale*, 8 N. B. R. 43; 1 Amer. Law T. Rep. Bankr. 295; Fed. Cas. 10,066.

### (b) *Discharge.*

48. Bankrupt filed a voluntary petition after having made an assignment under state law. *Held*, that court could give effect to composition proceedings in case of voluntary bankruptcy, although bankrupt had forfeited his right to a discharge. In re *Troth*, 19 N. B. R. 253; 2 N. J. Law T. 147; 36 Leg. Int. 158; Fed. Cas. 14,188.

49. Where the debtor has made a general assignment, to prevent a discharge the assignment must have been made, not only in contemplation of bankruptcy, but it must have been made with intent to prefer some creditor, or from preventing the property from coming into the hands of his assignee in bankruptcy, or from being distributed in satisfaction of his debts. In re *Croft Bros.*, 17 N. B. R. 324; 6 N. Y. Wkly. Dig. 218; 8 Biss. 188; 10 Chi. Leg. News, 204; 6 Amer. Law Rep. 597; Fed. Cas. 3,404.

50. Sixteen days before filing petition, bankrupt made a general assignment, when a creditor was about to obtain a judgment against him. *Held* not sufficient cause to refuse a discharge. In re *Pierce et al.*, 3 N. B. R. 61; 26 Leg. Int. 332; 16 Pittsb. Leg. J. 204; Fed. Cas. 11,141.

51. A general assignment of all property to a private assignee for the benefit of creditors, a few days before filing a petition in bankruptcy, is, in the absence of evidence of a change of circumstances, ground for withholding a discharge. In re *Brodhead*, 2 N. B. R. 93; 3 Ben. 106; 1 Chi. Leg. News, 107; Fed. Cas. 1,918.

## IX. REVOCATION.

52. A power of revocation, inserted in an assignment made by a debtor, would render such assignment constructively fraudulent. *Jones, Ass. v. Clifton*, 18 N. B. R. 125; 17 Amer. Law Reg. (N. S.) 713; 6 Reporter, 324; 7 Cent. Law J. 522; Fed. Cas. 7,457.

## X. OF PROPERTY.

### (a) *When Valid.*

53. An attachment is sequestration of a debtor's property to pay a single debt. An assignment in insolvency is a sequestration of a debtor's property to pay his creditors *pro rata*. The one may work a preference, the other cannot. *Maltbie v. Hotchkiss*, 5 N. B. R. 485.

54. The delivery of schedules of assets is not essential to the validity of a common-law assignment for the benefit of creditors. In re *Kimball et al.*, 16 N. B. R. 188; Fed. Cas. 7,770.

55. A general assignment by insolvent debtors under the New York state law for the benefit of creditors, untainted by fraud, or the bankrupt act, is valid, and the property will not be turned over to the assignee in bankruptcy. *Sedgewick, Ass. v. Place et al.*, 1 N. B. R. 204; 1 Amer. Law T. Rep. Bankr. 97; 34 Conn. 552; Fed. Cas. 12,622.

56. Although an assignment be not duly acknowledged or recorded, yet it is valid, as against a party who takes title from the bankrupt after the commencement of the

proceedings in bankruptcy. *Brady v. Otis et al.*, 14 N. B. R. 845.

57. Bankruptcy and judgments are involuntary, and do not avoid covenants against assignments and transfers, either in leases or policies of insurance. *Starkweather v. Cleveland Ins. Co.*, 4 N. B. R. 110; 3 Chi. Leg. News, 77; 28 Leg. Int. 36; 10 Amer. Law Reg. (N. S.) 333; 5 Amer. Law Rev. 568; Fed. Cas. 13,308.

58. A debtor, twelve months prior to his filing his petition in bankruptcy, conveyed by assignment for the benefit of all his creditors all his property. The assignee claimed to be entitled to said property. The claim was held not to be good. *In re Arledge*, 1 N. B. R. 195; Fed. Cas. 533.

### (b) *By Consent.*

59. A consent to assignment of an open account, given after the commission of the act of bankruptcy, but before the filing of the petition, does not confer any better rights upon the assignee. *Rollins, Ass., v. Twitchell & Co.*, 14 N. B. R. 201; 2 Hask. 66; 5 Amer. Law Rec. 247; Fed. Cas. 12,027.

### (c) *When Void.*

60. T. and W., copartners, made an assignment for the benefit of their creditors, but the signature and assent of the assignee were never obtained. Subsequently T. and W. made a secret agreement dissolving the firm and transferring the assets to T., who, twelve days afterwards, made an assignment. T. and W. having been adjudged bankrupt, the assignment was set aside as in fraud of the bankrupt law. *Held*, that the transaction between T. and W. was invalid as to firm creditors and assets must be held as firm assets. *In re Tomes et al.*, 19 N. B. R. 36; Fed. Cas. 14,084.

61. A debtor being insolvent assigned his property, giving preferences among his creditors. Creditors' bills were filed and a receiver appointed, who brought suit against the assignee to recover certain of the assets. Judgment was rendered for the receiver, and was affirmed on appeal. *Sedgwick, Ass., v. Minck et al.*, 1 N. B. R. 204; 6 Blatchf. 156; Fed. Cas. 12,616.

62. When bankrupt had made an assign-

ment of land for the benefit of such creditors as should sign a compromise agreement, and none others, the surplus to revert to the assignor, it was void as to bankrupt's assignee. *In re Broome*, 8 N. B. R. 113; Fed. Cas. 1,967.

63. Debtor made an assignment of his goods and notes of hand to a creditor within six weeks of the filing of a petition against debtor. Assignment was held void under the act, and assignee entitled to recover the value of goods and notes from preferred creditor. *North, Ass., v. House et al.*, 6 N. B. R. 365; Fed. Cas. 10,310.

64. An assignment, though voidable at the suit of the assignee, is not void. *Sparhawk et al. v. Drexel et al.*, 12 N. B. R. 450; 1 Wkly. Notes Cas. 560; Fed. Cas. 13,204.

## ASSUMPSIT.

See PLEADING AND PRACTICE, 43.

## ATTACHMENT.

### I. WHEN NULL AND VOID.

- (a) *Dissolution.*
- (b) *To Defeat Bankrupt Act.*
- (c) *Computation of Date.*

### II. WHEN VALID.

### III. TRUSTEE.

- (a) *Property Passes to.*
- (b) *Funds Not Subject to Process.*
- (c) *Rights of.*

### IV. JUDGMENT LIEN.

- (a) *Merger.*
- (b) *Computation of Time.*
- (c) *On Property.*
- (d) *Mortgage.*

### V. COMPOSITION.

- (a) *Participation in.*
- (b) *Effect of.*

### VI. PREFERENCE.

- (a) *When Lawful.*
- (b) *When a Security.*

### VII. BOND TO DISSOLVE.

- (a) *After Discharge.*
- (b) *Sureties on.*

### VIII. COSTS IN.

### IX. AGAINST PARTIES.

**X. FEDERAL AND STATE COURTS.**

- (a) *Jurisdiction.*
- (b) *Conflict of.*
- (c) *Injunction.*

**XI. INTERVENOR.**

- (a) *Creditor.*
- (b) *Trustee.*

**XII. RECEIPTOR.**

- (a) *Property.*
- (b) *Release.*

See DISCHARGE, 809; ESTATE, 24, 33, 43, 125, 133, 223, 287; EXEMPTIONS, 104; PETITION, 78; TRUSTEE, 67, 103.

**I. WHEN NULL AND VOID.****(a) *Dissolution of.***

1. An attachment was sued out within four months prior to institution of proceedings in bankruptcy. Plaintiffs claimed that their judgment operated as a lien on the property. It was held that there was no time at which the lien could attach, as the adjudication dissolved the attachment, and the deed of assignment related back and vested in the assignee as of the date of the filing of the petition. *In re Badenheim et al.*, 15 N. B. R. 370; Fed. Cas. 716.

2. The bankrupt law providing for the dissolution of attachment liens only operates on attachments pending at the time bankruptcy proceedings are commenced. *Shelley et al. v. Elliston, Ass.*, 18 N. B. R. 375; 26 Pittsb. Leg. J. 92; Fed. Cas. 12,750.

3. An attachment of a bankrupt's goods in a state court within four months before bankruptcy is defeated by the provisions of the act of 1867. *Pennington v. Lowenstein et al.*, 1 N. B. R. 157; Fed. Cas. 10,938.

4. On motion in a state court, an attachment issued within four months before the beginning of bankruptcy proceedings will be dissolved, although judgment has been entered and proceeds of sale paid to plaintiff. *Dickerson v. Spaulding et al., Ass.*, 15 N. B. R. 818.

5. Where there was an attachment pending against A., who was declared a bankrupt and his assignee was appointed under the laws of the United States, it was held that the assignee may be made a party to the attachment, and that it was proper to declare

the attachment dissolved by the bankruptcy. *Kent & Co. v. Downing, Ass.*, 10 N. B. R. 533.

6. Appellant assignee contended that attachment was dissolved by bankruptcy proceedings. It was held, attachment within four months prior to commencement of suit is dissolved by the bankruptcy proceedings. *Miller v. Bowles et al., Appleton v. Stevers, Ass.*, 10 N. B. R. 515.

7. Attachments issued by state courts within four months before the commencement of proceedings in bankruptcy are dissolved by the appointment of an assignee. *Kaiser et al. v. Richardson*, 14 N. B. R. 391.

8. An assignment to an assignee, duly appointed under the bankrupt act, dissolves an attachment sued out of a state court levied upon the property of a bankrupt within four months of the commencement of proceedings. *Duffield et al., Ass. v. Horton et al.*, 16 N. B. R. 59.

9. Where proceedings in bankruptcy were commenced within four months after the levy of an attachment, it was held that such attachment was dissolved by the bankruptcy proceedings. *Bank of Columbia v. Overstreet et al.*, 13 N. B. R. 154.

10. The conditional lien acquired by the levy of an attachment or of its being laid in the hands of a garnishee may be diverted by the operation of a general bankrupt law or a local insolvent law, if the language of the act be sufficiently clear to indicate that purpose. *Corner v. Miller et al.*, 1 N. B. R. 98.

11. Attachment in state courts brought within four months before the commencement of proceedings in bankruptcy are dissolved by such proceedings. *In re Ellis*, 1 N. B. R. 154; Fed. Cas. 4,400.

12. The right of creditors to prosecute their attachment suits after commencement of bankruptcy proceedings is taken away, and attachments within four months are dissolved by said act. An officer in possession of property under writ of attachment cannot refuse to deliver it until his fees are paid. *In re Stevens*, 5 N. B. R. 298; 2 Biss. 873; 10 Amer. Law Reg. (N. S.) 523; Fed. Cas. 13,392.

**(b) *To Defeat Bankrupt Act.***

13. A positive averment in the petition that attachment proceedings were not taken

to defeat the operation of the bankrupt act is not rebutted by the omission of the attachment creditors to commence proceedings in bankruptcy. In re Ward, 9 N. B. R. 349; Fed. Cas. 17,145.

### (c) *Computation of Date.*

14. An attachment under proceedings in the state court is dissolved from the date of the commencement of the bankruptcy proceedings. In re Preston, 6 N. B. R. 545; Fed. Cas. 11,894.

15. In an attachment brought within four months before commencement of proceedings in bankruptcy, if the plaintiff has received the proceeds of a sale on his judgment before the petition is filed, he is liable to the assignee for the money; or, if it remains in the hands of the sheriff, the assignee may obtain an order directing the payment to himself. Conner v. Long, 104 U. S. 238.

16. Where property has been sold under attachment after commencement of bankruptcy proceedings, no title passes by the sale, and the plaintiff in the attachment and the purchaser at the sheriff's sale are liable to the assignee for a conversion. Id.

17. Where a sheriff levied an attachment on goods before and under an order of the court, sold them after proceedings in bankruptcy were closed against the defendant in the attachment suit, but before notice of such proceedings, the sheriff is not liable, in an action by the assignee in bankruptcy appointed after such sale, for the conversion of the goods. Id.

## II. WHEN VALID.

18. An attachment, by trustee process, creates a lien on funds in the hands of a trustee, after service on him and without notice to the debtor, which will be saved when made the prescribed length of time before commencement of bankruptcy proceedings. In re Peck, 16 N. B. R. 43; 9 Ben. 169; Fed. Cas. 10,886.

19. Under writ issued on March 14th defendant's property was attached. August 26th, defendant commenced proceedings in bankruptcy, and obtained discharge Decem-

ber 11th, and pleaded the same in bar of the action. It was held that proceedings in bankruptcy did not dissolve the attachment, and judgment for plaintiff affirmed. In re Bates v. Tappan, 3 N. B. R. 159.

20. Where law recognizes a lien and authorizes provisional attachment to satisfy final judgment, being to determine simply amount of lien, it is not dissolved by bankruptcy. Marshall v. Knox, Asa, 8 N. B. R. 97; 16 Wall. 551.

21. An attachment made more than four months before the commencement of the defendant's proceedings in bankruptcy is preserved by necessary implication from the bankrupt act, which dissolves only those attachments made within four months from such commencement. Deighton v. Kelsey et al., 4 N. B. R. 155.

22. An attachment is not dissolved by institution of proceedings in bankruptcy if the attachment was placed in the garnishee's hands more than four months prior to the commencement of the proceedings. Hatch v. Seely, 13 N. B. R. 380.

23. Proceedings in bankruptcy do not dissolve an attachment issued by a state court and levied upon the property of the bankrupt more than four months prior to their commencement, and a judgment can be entered for a sale, and the property sold, notwithstanding a discharge is pleaded in bar of the action. Davis v. Friedlander, 104 U. S. 570.

24. The sale under such decree divested whatever interest or title the assignees had in the property. Id.

25. Creditors cannot thereafter maintain a bill to declare such sale void and place the property attached in the assignee's possession to be sold. Id.

## III. TRUSTEE.

### (a) *Property Passes to.*

26. Where a writ was issued and laid in the hands of the garnishee within four months next preceding the commencement of the proceedings against the bankrupt, his assignee, who has received a conveyance of all his estate, is entitled to the funds and property in the hands of the garnishees, and



the attachment should be dissolved. In re Corner v. Miller et al., 1 N. B. R. 98.

27. An assignee sued an attaching creditor for the value of goods taken under attachment against the bankrupt, and sold after commencement of proceedings. The attachment was instituted within four months prior to beginning of proceedings in bankruptcy. It was held that assignee could recover. Bracken v. Johnston, 15 N. B. R. 106; 4 Dill 518; 5 Amer. Law Rec. 401; 3 Month. Jur. 629; 4 Cent. Law J. 9; 3 Amer. Law T. Rep. (U. S.) 537; 11 Amer. Law Rev. 609; 3 N. Y. Wkly. Dig. 573; 1 Cin. Law Bul. 358; Fed. Cas. 1,761; sec. 14.

#### (b) *Funds Not Subject to Process.*

28. The distribution of the assets of a bankrupt cannot be interfered with by garnishment or any other process of a state court. In re Bridgman, 2 N. B. R. 84; 1 Chi. Leg. News, 103; Fed. Cas. 1,867; In re Cunningham, 19 N. B. R. 276; 20 Alb. Law T. 257; Fed. Cas. 3,478.

#### (c) *Rights of.*

29. An assignee in bankruptcy has the right to move for a dissolution of an attachment, and it is not proper to put him on terms in this respect. King v. Loudon, Ass., 14 N. B. R. 383.

### IV. JUDGMENT LIEN.

#### (a) *Merger.*

30. In an attachment suit, when the judgment is rendered, and the property is condemned for the payment thereof, there is no longer any attachment in existence. It is merged in the judgment, and the goods are held by virtue of the judgment. Shelley et al. v. Elliston, Ass., 18 N. B. R. 375; 26 Pittsb. Leg. J. 93; Fed. Cas. 12,750.

31. A creditor who obtains a lien by attachment, has prosecuted suit to judgment and made an execution levy, acquires a lien under such levy which is prior to that of other creditors who have levied attachments in the meantime, and is not affected by the dissolution of the attachments. In re Steele

et al., 16 N. B. R. 103; 7 Biss. 504; Fed. Cas. 13,345.

#### (b) *Computation of Time.*

32. Where a judgment is recovered in attachment suit and process is issued for sale of the property, the lien relates back to the date of attachment. Hudson, Ass., v. Adams, 18 N. B. R. 102; 3 Cin. Law Bul. 1066; Fed. Cas. 6,832.

#### (c) *On Property.*

33. The ultimate property in goods levied on by attachment is in the debtor. In re Hull, 18 N. B. R. 1; Fed. Cas. 6,857.

34. A creditor who has brought his action more than four months before commencement of the proceedings, and has made an attachment which is not dissolved by such proceedings, may, after the question of the bankrupt's discharge has been determined by the United States court, have a special judgment against the property attached, even if discharge has been granted to the bankrupt. Ray et al. v. Wight et al., 14 N. B. R. 563.

35. Sheriff had custody of the goods of the bankrupt by virtue of an attachment. Other creditors obtained judgment and issued execution. It was held that the subsequent executions created a lien on all the goods in the sheriff's hands not covered by the first attachment. In re Nelson, 16 N. B. R. 312; 9 Ben. 238; Fed. Cas. 10,100.

36. An attachment is a lien, and such a lien as can be enforced in a state court, notwithstanding bankruptcy proceedings, by a judgment, limited in its operation to the property attached, and not to be enforced against the other property or the person of the bankrupt. Stoddard v. Locke et al., 9 N. B. R. 73.

37. An attachment on mesne process creates a valid lien on a debtor's property within the meaning of the act of 1867. Peck v. Jenness, 7 How. 612; Colby v. Ledden, id. 626.

38. The attachment lien is not defeated by interposing the plea of bankruptcy as a bar to judgment; but the judgment may be collected out of the attached property only. Peck v. Jenness, 7 How. 612.

39. While an attachment against a bank-

rupt remains in force notwithstanding the discharge of the bankrupt, the creditor may have judgment against him, to be levied only upon the property attached. *Hill v. Harding*, 180 U. S. 699.

(d) *Mortgage.*

See MORTGAGE, 84.

40. The defendant, in an action by a sheriff to recover the value of property subject to an attachment, cannot interpose a mortgage as a defense unless it appears that the property was restored to the mortgagee. *Rowe v. Page*, 18 N. B. R. 866.

V. COMPOSITION.

See COMPOSITION, 74, 76, 86.

(a) *Participation in.*

41. Attaching creditors have no right to participate in composition meeting. In re Shields, 15 N. B. R. 532; 4 Dill. 588; 4 Cent. Law J. 557; 24 Pittsb. Leg. J. 190; Fed. Cas. 12,784.

(b) *Effect of.*

42. A creditor levied attachment on a debtor's property within four months before proceedings in bankruptcy were commenced. A composition was proposed by the debtor and confirmed. The defendant then filed a special plea in the attachment setting up the facts, having theretofore moved to quash the attachment. The court held that the attacking creditor's debt was extinguished and the attachment would fall. *Miller v. Mackenzie et al.*, 13 N. B. R. 496.

VI. PREFERENCE.

See PREFERENCES, 103, 248.

(a) *When Lawful.*

43. A debtor transferred his stock of goods to a creditor. Later other creditors attached the goods, and after attachment the debtor became a bankrupt and the goods were transferred to the assignee. The first transferee brought an action against the attaching creditors for seizure and conversion. It was held that he was entitled to recover the value

of the property. *Bromley v. Goodrich et al.*, 15 N. B. R. 289.

44. An attachment is a sequestration of a debtor's property to pay a single debt. An assignment in insolvency is a sequestration of all a debtor's property to pay all his creditors *pro rata*. The one may work a preference, the other cannot. *Maltbie v. Hotchkiss*, 5 N. B. R. 485.

45. The taking of property on attachment or execution is receiving a preference. The mere obtaining of judgment, however, is not. In re Stevens, 4 N. B. R. 122; Fed. Cas. 13,891.

(b) *When a Security.*

46. Action was brought by the assignee to recover personalty alleged to have been transferred in fraud of bankrupt law. More than four months before the bankruptcy proceedings creditors had attached the property, which was receipted for by the present defendant, who thus kept possession. Thereafter the bankrupt executed to him a bill of sale of the property, part of which he sold and applied on the executions in the suits of the attaching creditors. The jury found for the defendant, the transfer being merely as security. *Parsons v. Topliff*, 14 N. B. R. 547.

47. Where the attachment is a security and the bankrupt is a mere accommodation acceptor, the creditor has a right to proceed against the bankrupt for his debt, and also against the other parties to the bill under his attachment, until he has received the full amount of his debt, for it is a security obtained by the creditor against other parties to the bill by a proceeding *in invitum*. In re Cram, 1 N. B. R. 133; 1 Hask. 89; 1 Amer. Law T. Rep. Bankr. 65, 120; Fed. Cas. 3,348.

VII. BOND TO DISSOLVE.

(a) *After Discharge.*

48. If the bankrupt, after the commencement of the proceedings, gives a bond to dissolve an attachment issued more than four months before that time, and subsequently pleads a discharge, a special judgment cannot be entered to be enforced by action upon the bond. *Hamilton v. Bryant*, 14 N. B. R. 479.

49. A bankrupt-defendant may file a bond to dissolve an attachment, although it was issued more than four months before the commencement of the proceedings in bankruptcy, and have the case continued to await his discharge. *Braley v. Boomer et al.*, 12 N. B. R. 303.

50. A bond to dissolve an attachment existing upon the property of a defendant more than four months prior to the commencement of proceedings that adjudged him a bankrupt is filed too late after the discharge in bankruptcy. *Johnson v. Collins*, 12 N. B. R. 70.

#### (b) *Sureties on.*

51. The discharge of a bankrupt does not affect the creditor's remedy against the sureties upon a bond given to dissolve a writ of garnishment issued more than four months before commencement of proceedings. In *re Albrecht*, 17 N. B. R. 287; Fed. Cas. 145.

52. Where an attachment has been dissolved by the defendant entering into a bond or with sureties conditioned to pay to the plaintiffs any judgment rendered against him on final trial, there is nothing in the bankrupt act to prevent the state court from rendering a judgment against the bankrupt notwithstanding his discharge, for the purpose of enabling the plaintiffs to proceed against the sureties in the bond given on the attachment. *Hill v. Harding*, 180 U. S. 699.

### VIII. COSTS IN.

53. The costs of attachment that has been dissolved by bankruptcy may be paid out of the fund unless the attachment did not operate to preserve the property for the creditors. *Ex parte Holmes*, In *re Holmes et al.*, 14 N. B. R. 498; Fed. Cas. 6,681. See § 12, *supra*.

### IX. AGAINST PARTNERS.

54. The commencement of proceeding in bankruptcy against one partner within four months after the issuing of attachment against the firm does not dissolve the attachment. Where the attachment is issued more than four months before the commencement of proceedings in bankruptcy,

the proceedings for a judgment will not be stayed. *Mason et al. v. Warthen et al.*, 14 N. B. R. 346.

### X. FEDERAL AND STATE COURTS.

See COURTS, 107, 178.

#### (a) *Jurisdiction.*

55. An attachment issued by a state court against a corporation more than four months before the commencement of the proceedings in bankruptcy will not be dismissed for want of jurisdiction. *Munson v. Boston, H. & E. R. R. Co.*, 14 N. B. R. 178.

#### (b) *Conflict of.*

56. A sheriff attached the property of a debtor, who, upon the same day, lodged with the probate court a deed of assignment under the insolvent laws of Connecticut. The assignee in bankruptcy claimed the property. It was held, judgment for plaintiff, the state law not being repealed by the United States bankruptcy law of 1867. *Maltbie v. Hotchkiss*, 5 N. B. R. 485.

#### (c) *Injunction.*

See INJUNCTION, 56.

57. A vessel belonging to bankrupts, in the hands of assignee, cannot be attached in an action *in rem* for damages caused by her collision with another vessel prior to the adjudication, and the bankruptcy court will restrain such proceedings by injunction. In *re People's M. S. S. Co.*, 2 N. B. R. 170; 3 Ben. 226; Fed. Cas. 10,970.

### XI. INTERVENOR.

See INTERVENTION, 5-7, 12.

#### (a) *Creditor.*

58. Where a creditor has obtained attachment after filing of petition, he has no right to intervene and oppose adjudication. In *re Vogel et al.*, 18 N. B. R. 185; 9 Ben. 498; Fed. Cas. 16,981.

59. An adjudication may be opposed by a creditor who, prior to the filing of the peti-

tion, has obtained a lien upon the property of the bankrupt by process of attachment and may intervene for that purpose. In re Burton et al., 17 N. B. R. 212; 9 Ben. 324; Fed. Cas. 2,214.

60. An attaching creditor may intervene to contest an adjudication upon the merits, as well as to claim that the court has no jurisdiction of the case. In re Williams, 14 N. B. R. 182; Fed. Cas. 17,706.

61. An attaching creditor may move to set aside an adjudication of bankruptcy, though not a party to proceedings. In re Bergeron, 12 N. B. R. 385; 2 Cent. Law J. 507; 1 N. Y. Wkly. Dig. 178; Fed. Cas. 1,842.

### (b) *Trustees.*

62. An assignee in bankruptcy cannot attack collaterally a sale under attachment of property in the possession of the sheriff before the filing of the petition, but should intervene and claim the property in the attachment suit. Valliant, Ass., v. Childress, 11 N. B. R. 317; 21 Wall. 642.

## XII. RECEIPTOR.

### (a) *Property.*

63. Plaintiff attached personal property of debtor more than four months before proceedings in bankruptcy. The defendant procured a receiptor and the property went into his hands. The defendant was adjudged bankrupt. It was held that plaintiff was entitled to a judgment, and could levy execution upon the money which might be collected from the receiptor. Batchelder v. Punam, 18 N. B. R. 404.

### (b) *Release.*

64. The obligation of a receiptor was merely to produce the property attached to satisfy any execution that might be issued. Bankruptcy proceedings were commenced within four months after the issuing of an attachment and assignee appointed. It was held that the receiptor was released. Kaiser et al. v. Richardson, 14 N. B. R. 391.

## ATTORNEYS.

### I. AUTHORITY.

#### II. MAY BE TRUSTEE.

#### III. WHO MAY APPEAR BY.

#### IV. GENERAL.

See CONTRACTS, 10; COSTS, I, (c), II, (b); EVIDENCE, 50, 52, 53; EXAMINATION OF BANKRUPT, VI; PROOF OF CLAIMS, 24; REFERENCE, 49; SALES, 7, 15.

### I. AUTHORITY.

1. An attorney at law, appearing before a register to represent a party in interest, is to be recognized as such, unless some one puts him to proof, by a rule therefor; but all others must produce formal powers of attorney. In re Scott, Collins & Co., 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

2. At a meeting of creditors an attorney appeared and submitted powers of attorney from creditors to cast vote, etc., in election of assignee, the powers being executed before a notary and a clerk of a court, respectively. Held, attorney could not act in capacity of proxy in such case. In re Christley, 10 N. B. R. 268; 6 Biss. 154; Fed. Cas. 2,702.

3. An attorney, to verify a petition, affidavit or proof, must show his authority. In re Sargent, 18 N. B. R. 144; 1 N. Y. Wkly. Dig. 435; Fed. Cas. 12,361.

4. The attorney for the company against whom a petition was filed, after service, waived lapse of time for the return day and admitted the acts of bankruptcy charged. Six months afterward the adjudication was entered, and when the court had entered upon the administration of the assets, stockholders moved to set the adjudication aside. Held, that they had waived their right to be heard. In re Republic Ins. Co., 8 N. B. R. 317; Fed. Cas. 11,706.

5. At an adjourned meeting called for 11 o'clock, at 11:20 a creditor resumed an examination of the debtor. An attorney for another creditor coming in asked to resume the examination. It being shown that his power of attorney had been revoked, he then asked to examine the debtor on behalf of still another creditor. He was refused. In re Tift, 17 N. B. R. 550; Fed. Cas. 14,080.

6. An attorney who has no authority to appear in a proceeding instituted by the assignee will not be heard to question the authority of the attorney who appears as counsel for the assignee. *In re Comstock & Co.*, 13 N. B. R. 198; 3 Sawy. 517; 8 Chi. Leg. News, 83; Fed. Cas. 3,080.

7. A statement made professionally by counsel, that they were duly authorized by bankrupt to file its petition and prosecute the proceeding, is conclusive evidence of the fact asserted, unless proof to the contrary is shown. *Alabama & Chattanooga R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126.

## II. MAY BE TRUSTEE.

8. An attorney for creditors may be appointed assignee of the bankrupt's estate. *In re Barrett*, 2 N. B. R. 165; 2 Hughes, 444; 1 Chi. Leg. News, 202; 2 Amer. Law T. Rep. 182; 11 Int. Rev. Rec. 21; 1 Amer. Law T. Bankr. 144; Fed. Cas. 1,043.

## III. WHO MAY APPEAR BY.

9. In ordinary cases of involuntary proceedings in bankruptcy against corporations, it is to be inferred, barring legal restrictions, that they will have power to appear by counsel, and that the usual confidence will exist between counsel and client, and that the counsel will act within the scope of their authority. *Leiter et al. v. Payson*, 9 N. B. R. 205; 6 Chi. Leg. News, 157; Fed. Cas. 8,226.

10. A witness is not entitled to counsel in his examination before the register, although the examination of the witness may establish a liability on his part to the bankrupt. *In re Stuyvesant Bank*, 7 N. B. R. 445; 6 Ben. 33; Fed. Cas. 13,582.

11. It is only parties, the bankrupt or a creditor, who are entitled to be represented by counsel, either before a register or the court, unless where a witness is made a party to a new collateral proceeding by being cited to answer for an alleged contempt. *In re Fredenburg*, 1 N. B. R. 34; 2 Ben. 183; Fed. Cas. 5,076.

12. A witness who was summoned before a register for examination appeared accompanied by counsel. The attorney offered to appear as counsel for the witness and also for

a bank. Neither the witness nor the bank was a party to the proceedings. *Held*, that the witness and the bank were not entitled to appear by counsel. *In re Comstock & Co.*, 13 N. B. R. 198; 3 Sawy. 517; 8 Chi. Leg. News, 83; Fed. Cas. 3,080.

## IV. GENERAL.

13. A debt growing out of the conversion by an attorney of his client's money or property, in his hands as such, both on principle and authority, is a debt created while acting in a fiduciary character. *Flanagan v. Pearson*, 14 N. B. R. 87.

14. If a bankrupt's counsel fails to appear for him in an action because he supposed that the counsel for a co-defendant also represented the bankrupt, a review of a judgment by default will be granted, so that a discharge in bankruptcy may be pleaded. *Shurtleff v. Thompson*, 13 N. B. R. 524.

15. Certain attorneys having taken such proceedings in the bankrupt court as rendered nugatory prior pending proceedings in the state court, and been adjudged by state court in contempt of court and disbarred until they procured dismissal of the bankruptcy proceedings and the return of the fund to the jurisdiction of the state court, the supreme court of South Carolina held that the condition of their reinstatement was impossible, but that they should not be disbarred, they having disavowed any intention to disobey. *Watson v. Citizens' Savings Bank*, 9 N. B. R. 458.

16. C., as attorney, with knowledge of pending bankruptcy proceedings of his client, commenced an action against a railroad company, obtained judgment and sought to secure appointment of receiver for his client. An injunction was issued restraining C. from further proceeding with his application for a receiver, notwithstanding which, C. has receiver appointed. C. was held guilty of contempt. *In re South Side Railroad Co.*, 10 N. B. R. 274; 7 Ben. 891; Fed. Cas. 13,190.

17. Acts and things which have come to a witness' knowledge by reason of his position as counsel of bankrupt may be inquired about, and the witness be required to state all the information he has in regard to them which was not communicated to him by the

bankrupt, or by some one through the bankrupt's direction. *In re Aspinwall*, 10 N. B. R. 448; 7 Ben. 433; 31 Leg. Int. 365; 22 Pittsb. Leg. J. 75; Fed. Cas. 591.

18. Counsel cannot be compelled to disclose any information imparted to him as counsel for bankrupt, nor to disclose information received on behalf of the bankrupt, as to the bankrupt's affairs, from persons to whom he was referred by the bankrupt. *Id.*

19. The privilege of counsel does not extend to the concealment of the subject discussed, but only of the discussion itself. *Id.*

20. Privilege of counsel will not justify counsel for bankrupt in refusing to answer with whom he had conversation in regard to the affairs of a bankrupt, though it will excuse him from stating the conversation had. *Id.*

21. An agreement of creditors with an attorney that he should prosecute at his own expense, in consideration of his retaining three-fourths of all sums recovered, their claims against bankrupt which were valid in their inception, is no defense against the same on account of champerty. *Lathrop et al.*, 3 N. B. R. 410 (8vo. ed.); 3 Ben. 490; Fed. Cas. 8,103.

22. The knowledge of plaintiff's attorney is the knowledge of the plaintiff where the question is whether the plaintiff in a judgment on which goods were taken in execution knew of the defendant's insolvency and attempted to evade the bankrupt law. *Rogers v. Palmer*, 19 N. B. R. 471; 102 U. S. 263.

### BANKRUPT.

See ACTS OF BANKRUPTCY; ADJUDICATION; ALIENS; CORPORATIONS; DISCHARGE; EXAMINATION; INFANTS; INSANITY; MARRIED WOMAN; PARTNERSHIP.

### BANKRUPTCY.

See ACTS OF BANKRUPTCY.

### BANKRUPT LAW.

See CONSTITUTIONAL LAW, 12.

1. While the enactment of a national bankruptcy law repealed the insolvent laws of each particular state, it did not deprive

the state tribunals of any portion of their jurisdiction necessary to the final administration of the estate of insolvents who had made a surrender previous to its passage. *Meekins, Kelly & Co. v. Their Creditors*, 3 N. B. R. 126.

2. The act of March 2, 1867, which provided that no petition or other proceeding under this act shall be filed, received or commenced before June 1, 1867, went into effect on the latter date, and proceedings under state insolvent laws prior thereto were valid. *Day v. Bardwell*, 3 N. B. R. 115.

3. The bankrupt laws passed prior to 1853 were temporary in their character, and their consideration did not enter into ordinary business arrangements. *The Six Penny Sav. Bank et al. v. Bank*, 10 N. B. R. 399; Fed. Cas. 12,919.

4. Bankrupt laws discharge the contract, as contradistinguished from insolvent laws, which only liberate the person. *Deford et al. v. Hewlett*, 18 N. B. R. 518.

5. The English and American bankrupt laws differ in this: that the English bankrupt law has relation to the commission of an act of bankruptcy, and the American to the filing of the petition. *Hovey et al. v. Home Ins. Co.*, 10 N. B. R. 224; 13 Amer. Law Reg. (N. S.) 511; 8 Ins. Law J. 815; Fed. Cas. 6,743.

6. It is the intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations except those organized for religious, charitable, social, literary, educational, municipal or political purposes (act of 1867). *Ala. & Chatt. R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126.

7. The constitution gives congress full power over "the subject of bankruptcies" in the United States, and in the enactment of laws on this subject it is not limited to the scope or details of the bankrupt act in force in England at the time of the adoption of the constitution. *In re Silverman*, 4 N. B. R. 173; 2 Abb. (U. S.) 243; 1 Sawy. 410; Fed. Cas. 12,855.

8. The object of the bankrupt act is to compel an equal distribution of debtor's assets among all his creditors. *Morgan, Root & Co. v. Mastick*, 2 N. B. R. 163; Fed. Cas. 9,803.

9. The bankrupt act was intended to operate upon and provide for the discharge of debts created before as well as after its passage; and in respect to debts contracted before, it is clearly a retrospective law so far

as it authorizes the discharge of such prior debts. In re Cretiew, 5 N. B. R. 423; Fed. Cas. 3,390, overruling In re Rosenfeld, 1 N. B. R. 60; 15 Pittsb. Leg. J. 245; Fed. Cas. 12,059.

10. The bankrupt law has no extraterritorial effect so far as real property is concerned. *Oakley v. Bennett*, 11 How. 33.

11. The bankrupt law of a foreign country will not operate as a legal transfer of property in the United States. *Harrison v. Sterry*, 5 Cranch, 289.

## BANKS.

### I. WHAT ARE

#### II. CLAIMS AGAINST BANKRUPT BANKS.

#### III. CLAIMS OF BANK AGAINST BANKRUPT.

#### IV. LIENS OF BANKS.

#### V. CLAIMS OF ASSIGNEE AGAINST BANKS.

#### VI. SET-OFF.

#### VII. PREFERENCES.

##### (a) *To Banks.*

##### (b) *By Banks.*

#### VIII. NOTICE OF INSOLVENCY.

#### IX. DEPOSITORY.

#### X. IN GENERAL.

See CLAIM, 237; COURT, 79; ESTATES, 150, 229, 231, 233, 234; EXECUTOR, 1; FRAUD, 94; PETITION, 44; SECURED CLAIMS, 64; STATE LAW, 2.

### I. WHAT ARE.

1. An incorporated society which had been a bank doing a general banking business ceased business in 1862 because of civil strife; in 1863 it resumed for the purpose of liquidation only, being much hindered by stay laws, and was adjudicated bankrupt in 1872. The question of its solvency being raised, the court held that the society was not to be regarded as a bank or trader, as against persons with whom settlements were made within four months of bankruptcy, the only question being whether it could meet its liabilities as they accrued. *Harmanson, Ass., v. Bain et al.*, 15 N. B. R. 173; 1 Hughes, 188; Fed. Cas. 6,072.

### II. CLAIMS AGAINST BANKRUPT BANK.

2. When A. delivered to his bank money to pay a certain note and mortgage, which money was credited to A. on the books of

the bank, and entered into the general funds, A. is only a general creditor. In re Hosie, 7 N. B. R. 601; 5 Leg. Op. 89; Fed. Cas. 6,711.

3. The warden of a state prison deposited money, coming into his hands as warden, in a bank upon the order of the directors. The account was kept in the name of "H. N. Smith, warden." The bank was put into bankruptcy, and the question arose as to whether the state could claim the money, and so have priority over other creditors. *Held*, that the warden could prove his account as a general creditor. In re Corn Exch. Bank, 15 N. B. R. 431; 7 Biss 400; 9 Chi. Leg. News, 254; 4 Law & Eq. Rep. 29; 15 Alb. Law J. 851; Fed. Cas. 3,242. Reversing 15 N. B. R. 216.

4. A savings bank suspended payment, but subsequently re-opened for business and received new deposits, which were not kept separate, but taken as deposits generally, though the bank had advertised that these new deposits would be received as special separate deposits. Within a short time it again failed and was adjudged an involuntary bankrupt. The court held that these new deposits were not special deposits, and the depositors must take as general depositors. In re Mut. Bldg. Fund Society, etc., 15 N. B. R. 44; 2 Hughes, 374; 5 Amer. Law Rec. 571; Fed. Cas. 9,976.

5. A. deposited money with bankrupt's branch, which was afterward discontinued. The bankrupt made a public offer of twenty-five per cent. An agent of the branch bank received from A. a check for the full amount of the deposit, and paid her a dividend thereon at the rate of twenty-five per cent. The check was entered on the teller's journal and A.'s account balanced, but it was not entered on the deposit ledger from which the schedule in bankruptcy was made. *Held*, that such settlement was valid and binding. In re Bank of North Carolina v. Dewey, 19 N. B. R. 314; Fed. Cas. 897.

6. The assignee objected to bank's proving a claim, on the ground that a certain sum paid in notes by S. had not been credited. The payment was not indorsed on the draft, but the court assumed that the notes were paid. *Held*, that the bank could make proof of the whole amount of the draft; and if S. claimed that he was entitled to stand in the

place of the bank as to the sum paid, he could apply to the bankrupt court. *Downing, Ass., v. Traders' Bank*, 11 N. B. R. 371; 2 Dill 136; Fed. Cas. 4,046.

### III. CLAIMS OF BANK AGAINST BANKRUPT.

7. The members of the firm A., B. and C. were also partners in the firm A., B., C. and D. A., B. and C. drew a draft on D. individually on account of lumber shipped to A., B., C. and D. This draft was discounted at a bank. A., B., C. and D. became bankrupt. *Held*, that the amount of the draft could not be proven against the joint estate, but that the bank must look to D. for payment. In *re Savage et al.*, 16 N. B. R. 363; Fed. Cas. 12,381.

8. Two savings banks filed proofs of debt against estate of bankrupt savings bank, each claiming a preference over other creditors. *Held*, that the laws of New York do not entitle a savings bank to be preferred to other creditors in distributing the estate of a bankrupt bank of deposit under the bankrupt law. *The Six Penny Sav. Bank et al. v. Bank*, 10 N. B. R. 399; Fed. Cas. 12,919.

### IV. LIENS OF.

9. A banker has no lien upon the moneys of a depositor for any particular debt; hence any amount on deposit must go into the general assets. In *re Warner et al.*, 5 N. B. R. 414; Fed. Cas. 17,177.

10. A bank has a lien upon shares of its stock, deposited by a stockholder to secure a particular note, for all notes due from said stockholder to the bank; and this lien is not changed by the subsequent bankruptcy of the debtor. In *re Peebles*, 13 N. B. R. 149; 2 Hughes, 394; Fed. Cas. 10,902.

11. Where securities are deposited with a bank to secure a particular note of one of its stockholders who also owes it other notes, and the debtor becomes bankrupt, the bank can apply the securities to the other notes, on the principle that, the equities being equal between the bank and the general creditors in bankruptcy, the possession of the securities by the bank gives it the preference. *Id.*

12. Application was made upon the part of a national bank for an order directing a

sale by the bank of certain stocks belonging to the bankrupts, which the bank claimed to hold as security for its claim. The application was denied. In *re Bigelow et al.*, 1 N. B. R. 186; 2 Ben. 480; 1 Amer. Law T. Rep. Bankr. 95; Fed. Cas. 1,896.

13. Certain bankrupts were stockholders in a certain national bank, the bank being a creditor of said bankrupts. The bank claimed a lien upon the stock of said bankrupts. It was so held. In *re Bigelow et al.*, 1 N. B. R. 202; 2 Ben. 469; Fed. Cas. 1,895.

14. S. owned a number of shares of stock in a Louisville bank, the certificates of which he delivered to a Newark bank as security for money borrowed, with the transfer signed in blank. Subsequently he was adjudged a bankrupt in the courts in New Jersey and obtained his discharge. The Newark bank filled out the transfer and sought to compel the Louisville bank to recognize it. The latter refused on the ground that under its by-laws it held a lien on said stock to secure payment of all debts due and owing by S.; that it appeared in the bankrupt court and was allowed to retain the stock standing in the name of S.; and as a further defense it asserted that S.'s discharge by the bankrupt court extinguished the debt due to the Newark bank. *Held*, that the Louisville bank had no lien against the stock. *Second Nat. Bank of Louisville v. Bank*, 11 N. B. R. 49.

15. A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, and he has no right to apply the same to the payment of such debt without the consent of the depositor. In *re Warner et al.*, 5 N. B. R. 414; Fed. Cas. 17,177.

16. If a bank, after the commencement of proceedings in bankruptcy, collects money upon drafts deposited with it by the bankrupt before that time, it may apply the money toward the payment of a note of the bankrupt held by it. In *re Farnsworth, Brown & Co.*, 14 N. B. R. 148; 5 Biss. 223; Fed. Cas. 4,673.

17. The very nature of banking institutions does not permit banker's liens to extend to money on deposit, but is confined to sureties and valuables which may be in the banker's custody as collaterals. *Fourth Nat. Bank of Chicago v. Bank*, 10 N. B. R. 44.



## V. CLAIMS OF ASSIGNEE AGAINST BANKS.

18. A firm, having a deposit in a bank, were adjudicated bankrupts. Subsequently a creditor recovered judgment against them and procured an order restraining the bank from making any disposition of any property belonging to the bankrupt. The assignee sued the bank, and the court held that, the petition in bankruptcy having been filed before the judgment was obtained, the assignee could recover. *Morris, Ass. v. First Nat. Bank of N. Y.*, 15 N. B. R. 281.

19. One W. bought of a banker, afterwards bankrupt, a check on his New York bank. The check was not presented for payment until after bankruptcy of the drawer, when payment was refused. *Held*, that the funds in the New York bank passed to the assignee of the bankrupt, and W. was not entitled to priority of payment. *In re Smith*, 15 N. B. R. 459; 2 Cin. Law Bul. 119; Fed. Cas. 12,990.

20. The sheriff having made a levy and sale of the property of the bankrupt after the title had passed to the assignee deposited the proceeds with the judgment creditor, a bank, and received a certificate of deposit instead of a receipt. *Held*, bank liable to the assignee for the amount. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

## VI. SET-OFF.

See SET-OFF, 4, 6, 7, 10.

21. At date of voluntary assignment of a bank, the bank held defendant's note, discounted by them and not due. Defendant had at date of assignment a running account with the bank and a balance on deposit in excess of the amount of the note. *Held*, that the assignees of the bank were mere representatives and not purchasers for value and took the note subject to the set-off. *City Bank of Harrisburg v. Sherlock*, 16 N. B. R. 62.

22. Where there is a conditional transfer of a draft to the debtor of a bank which drew the draft, the debtor cannot set off such draft against a note made by him in favor of the bank. *Shryock et al., Ass. v. Bashore*, 15 N. B. R. 283.

## VII. PREFERENCES.

See PREFERENCES, 97, 99, 163.

### (a) To Banks.

23. Where a bankrupt, having a deposit with a bank which holds his note, gives a check for the amount so deposited, which is credited on the note, this is a preference, and is void. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

24. When a banker, according to his custom, charges his depositor in his deposit account for notes or other obligations as they fall due, the transaction is valid only as between the banker and the depositor; but if the depositor become bankrupt, it might constitute an unlawful preference. *In re Warner et al.*, 5 N. B. R. 414; Fed. Cas. 17,177.

25. Warrant for judgment was delivered to bank one month before petition was filed. It did not appear that bank had reasonable cause at the time to believe debtor insolvent, or knowledge that act was in fraud of bankrupt law. *Held*, that judgment and execution thereon were valid. *Shimer, Ass. v. Huber et al.*, 19 N. B. R. 414; 14 Phila. 403; 36 Leg. Int. 339; 8 Reporter, 393; Fed. Cas. 12,787.

26. A banker, holding as a special deposit certain bonds of a customer, without the latter's knowledge substituted for such bonds a note and mortgage, and upon his failure the customer ratified the act of substitution, after the banker's insolvency was notorious, and within thirty days of proceedings in bankruptcy against him. On bill filed by assignee to recover the note and mortgage, *held*, that the substitution was valid, it being a mere exchange of property and not calculated in any way to prefer a creditor. *Cook et al. v. Tullis*, 9 N. B. R. 433; 18 Wall. 332.

### (b) By Banks.

27. By an arrangement between the A. bank and the B. bank, the former acted as agent for the latter for clearing-house purposes. When the A. bank found that it was going to fail, it notified the B. bank, and after banking hours it paid to the B. bank the full amount of its deposits. *Held*, that such payment was a preference, and that the amount

could be recovered by the assignee in bankruptcy of the A. bank. *Phelan, Ass. etc., v. The Iron Mountain Bank*, 16 N. B. R. 303; 4 Dill. 88; 5 Cent. Law J. 351; Fed. Cas. 11,069.

28. A bank bought a lot of its own stock on the market. It had no right to hold the stock in its own name and parceled it out among the directors. One of the directors gave his note for some of the stock, and it was transferred to him on the books and he received the dividends, but the bank retained the certificate. This director became insolvent, and he transferred the stock to the bank's teller, but the bank retained the note as an asset. The assignee in bankruptcy brought an action to set aside the transfer as a preference. *Held*, that the bankrupt was not the owner of the shares, as the bank had no stock to convey. *Meyers, Ass., v. Bank*, 18 N. B. R. 34; Fed. Cas. 9,519.

29. It is not a payment if a banker about to fail procures a certificate of deposit in another bank for the benefit of a depositor, payable to the order of said depositor, and it could not be made to relate back to the date of the certificate instead of the date of the ratification. *Strain v. Gourdin et al.*, 11 N. B. R. 156; 2 Woods, 380; Fed. Cas. 13,521.

#### VIII. NOTICE OF INSOLVENCY.

30. A banker who receives collateral security for the payment of a draft which he cashed on the preceding day has reasonable cause to believe that the drawer is insolvent. *Merchants' Nat. Bank of Cin. v. Cook et al.*, Tr., 16 N. B. R. 391; 95 U. S. 342.

#### IX. DEPOSITORY.

31. Where a party lays claim to a certain fund, the possession of the depository is his possession, provided his claim is just and legal; and the assignee, in order to get possession and control, must proceed by a suit at law or in equity, as provided in the third clause of the second section of the act of 1867. *Smith v. Mason*, 6 N. B. R. 1; 14 Wall. 419.

32. A separate account with each bankrupt estate need not be kept by a bank in which the deposits of such estates are made in the name of the United States district

court. *State Nat. Bank v. Dodge*, 124 U. S. 333.

33. No state court can require a bank, in which the funds belonging to a bankrupt's estate are deposited, to pay a judgment against the assignee out of such funds. *Havens v. Bank*, 13 N. B. R. 95.

#### X. IN GENERAL.

34. Receivers of a bank claimed admittance as creditors of bankrupt upon certain indorsement by him; assignee resisted claim on ground that notes were usuriously discounted; claimant objected that this defense was not open under state laws. *Held*, effect of act of New York legislature forbidding corporations from interposing the defense of usury is to constitute the state of New York a state in which no rate of interest is fixed by law as against corporation borrowers, within the meaning of the Federal Banking and Currency Act. *Receiver of Ocean Nat. Bank v. Wild*, 10 N. B. R. 568; Fed. Cas. 11,624.

35. A bank in which funds are deposited to the credit of an assignee in bankruptcy has no power to pay any of said funds, except upon a proper warrant under the authority of the court of bankruptcy. *Havens v. Bank*, 13 N. B. R. 95.

36. The creditors of a bank in bankruptcy, whose estate has paid all debts in full, leaving a surplus in the hands of the assignee, the evidences of debt filed with the proofs being the bills or notes of bank, issued as money, are entitled only to interest on such notes from the date of the proof and filing of the bills before the register. To entitle the holder of bank-bills to interest thereon, presentation, demand and refusal are prerequisites, and neither the suspension of payment nor the commencement of proceedings in bankruptcy will operate to change a circulating medium into an interest-bearing obligation. *Wilson & Shafer v. Bank*, 10 N. B. R. 289; Fed. Cas. 894.

37. Certain stocks were sold by J. C. & Co. as brokers, the proceeds being deposited in a bank as a part of the brokerage account and regularly entered in the brokerage books of account. At the time of the failure of J. C. & Co. there remained in the bank to their credit more than enough to pay all the bro-

kenage accounts. Suit being brought for the proceeds, judgment was awarded the complainant. *Voight v. Lewis, Tr.*, 14 N. B. R. 543; 11 Phila. 511; 33 Leg. Int. 402; 9 Chi. Leg. News, 65; 11 Bankers' Mag. (3d S.) 481; 3 N. Y. Wkly. Dig. 421; 24 Pittsb. Leg. J. 54; Fed. Cas. 16,989.

38. When a bank receives notes from its customers for collection, it is liable to an action for damages at the suit of the depositor for its failure to duly present and protest, the consideration for such undertaking being the profits to the bank that might arise from such a transaction. In re Bank of Madison, 9 N. B. R. 184; 5 Biss. 515; Fed. Cas. 890.

39. Where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents and not the sub-agents of the owner of the note. *Hoover, Ass. etc., v. Wise et al.*, 14 N. B. R. 264; 91 U. S. 808.

40. A bank cashier discounting notes purchased of street brokers is presumed to know they are dealing for others, and that the notes were negotiated for the purpose of raising money on them. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

41. Banks created by the government for its own uses, the stock being exclusively owned by the government, are public corporations; but a bank whose stock is owned by private persons is a private corporation, though its object be of a public nature and the government share with the corporators in the stock. *Sweatt v. B. H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 839; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer. Law T. 174; 6 Amer. Law Rev. 168; Fed. Cas. 13,634.

42. The relation of banker and depositor is that of debtor and creditor. In re Corn Exch. Bank, 15 N. B. R. 216; Fed. Cas. 3,243.

43. A banker receiving a deposit agrees to pay it out on the presentation of the depositor's checks in the sums specified and to the persons presenting them, and agrees that the owner of the check shall, upon presentation, thereby become the owner and be entitled to receive the amount specified, provided the drawer has at the time the amount on deposit. *Fourth Nat. Bank of Chicago v. Bank*, 10 N. B. R. 44.

44. A provision in a bank charter prohibiting it from taking more than a given rate of interest avoids a contract reserving a greater rate. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

45. When a bank reserves illegal interest on its loans, unless its charter expressly declares that the contract of loan shall be void, it is void only as to the excess of interest charged, and not as to the principal. In re Moore, 1 N. B. R. 122; 2 Bond, 170; Fed. Cas. 10,041.

46. A cashier is still an officer of the bank for the purpose of being served with an order to show cause, although he has given the keys to the receiver appointed by a state court, and has become his clerk and ceases to act as cashier. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,218.

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## BILLS AND NOTES.

See COMMERCIAL PAPER.

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## BOARD OF TRUSTEES.

See TRUSTEES.

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## BONA FIDE TRANSFER.

See NOTICE, 26.

1. An insolvent debtor may sell or encumber his estate for a present and sufficient consideration, if the transaction be *bona fide*, and without fraud or an intention to defeat the operation of the bankrupt act. *Gattman & Co. v. Honea, Ass.*, 12 N. B. R. 493; 7 Chi. Leg. News, 895; Fed. Cas. 527.

2. The assignee in bankruptcy has no greater right than a judgment creditor; and although a sheriff's deed may be given as a mere cover, yet if his grantee convey such property to a *bona fide* purchaser without notice, for value, that deed will be protected. *Beall v. Harrell et al.*, 7 N. B. R. 400; Fed. Cas. 1,163.

3. To constitute a *bona fide* transfer, transferee must show that he had no notice and must have given a present consideration. *Rison, Ass., v. Knapp*, 4 N. B. R. 349; 1 Dill. 186; Fed. Cas. 11,861.

4. There is no concealment where a debtor makes a *bona fide* conversion of his property and shows good faith in respect to the care of the money received therefrom. *Fox v. Eekstein*, 4 N. B. R. 123; *Fed. Cas.* 5,009.

### BOND.

See *COURT*, 182; *MARRIED WOMAN*, 18.

1. Where no bond has been filed, no appeal can be allowed after ten days from entry of decree; but if proper bond, with sufficient sureties, is offered after ten days, the district court will approve it as a bond, leaving it to appellee to move to dismiss; but execution or decree in such case will not be stayed. *Benjamin, Ass., v. Hart*, 4 N. B. R. 408; 4 Ben. 454; *Fed. Cas.* 1,302.

2. A suit in equity cannot be maintained for the sole reason that the plaintiff (assignee) cannot give the bond required in an action at law. *In re The Oregon Iron Works*, 17 N. B. R. 404; 4 *Sawy.* 169; 26 *Pittsb. Leg. J.* 8; *Fed. Cas.* 10,562.

3. An assignee in bankruptcy should give a separate and distinct bond for each case in which he is appointed or elected. *In re Mo-Faden*, 3 N. B. R. 27; *Fed. Cas.* 8,785.

### BONUS.

Notes given for the excess or bonus over legal interest are void and must be surrendered to the assignee. *Shaffer v. Fritchery & Thomas*, 4 N. B. R. 179; *Fed. Cas.* 12,697.

### BOOKS OF ACCOUNT.

- I. WHAT ARE SUFFICIENT.
- II. WHAT NOT SUFFICIENT.
- III. WHO MUST KEEP.
- IV. HOW TO OBTAIN.

#### I. WHAT ARE SUFFICIENT.

1. If creditors can gather from the books kept by a bankrupt a correct understanding of his financial condition, the requirement that proper books of account shall be kept is satisfied. *In re Antisdell*, 18 N. B. R. 289; *Fed. Cas.* 490.

2. An entry of a chattel mortgage or a promissory note in a trader's blotter is a sufficient record in a bankrupt's books of account. *In re Winsor*, 16 N. B. R. 152; 9 *Chi. Leg. News*, 402; 3 *Cin. Law Bul.* 212; *Fed. Cas.* 17,885.

3. It is not necessary that the books of account kept by a trader, as such, contain entries of debts owed by him at the time he went into trade, previously contracted, as well as those debts incurred in his business as a trader. *Id.*

4. A retail grocer keeping no invoice book, but keeping all invoice bills together, so that a complete account of goods received by him can be made from them, and keeping other customary books, keeps proper books of account. The question is one of fact in each case. *In re Reed*, 12 N. B. R. 390; 1 N. Y. *Wkly. Dig.* 100; *Fed. Cas.* 11,639.

5. An agent and salesman for one S., the bankrupt, conducted the business of butchering under a contract providing that he should account to S. daily, and pay all moneys to S. until said S. was reimbursed for his money outlay. A book-keeper entered the transactions daily in a pass-book kept in the bankrupt's possession. *Held*, that the pass-book was one of bankrupt's books, and a proper one under the law. *In re Blumenthal*, 18 N. B. R. 575; *Fed. Cas.* 1,576.

6. Invoice or stock books, from which to determine what property he possessed in his trade, are indispensable books of account of a merchant or tradesman. *In re White*, 2 N. B. R. 179; 16 *Pittsb. Leg. J.* 110; 2 *Amer. Law T.* 105; 1 *Amer. Law T. Rep. Bankr.* 136; 1 *Chi. Leg. News*, 326; *Fed. Cas.* 17,532.

7. In proceedings in opposition to the discharge of a bankrupt upon the ground that he had not kept proper books of account, a detached check is admissible in evidence by the bankrupt, where such check once formed a part of the book, and, together with the stub, shows just how the book was kept. *In re Brockway*, 7 N. B. R. 595; 6 Ben. 326; *Fed. Cas.* 1,917.

8. Objections were made to discharge on ground that bankrupt failed to keep proper books of account in another business. *Held*, that such objections were invalid. *In re Friedberg*, 19 N. B. R. 302; *Fed. Cas.* 5116.

## II. WHAT NOT SUFFICIENT.

9. A debtor kept no books showing transactions with a person whom creditors alleged to be his partner, but he kept proper books of account with customers. *Held*, that dealings with the alleged partner were as much a part of his business as his dealings with his customers. In *re Blumenthal*, 18 N. B. R. 555; Fed. Cas. 1,575.

10. Where the bankrupts are charged with not keeping proper books of account, and the receipts and disbursement entered in cash book are unintelligible, discharge cannot be granted. In *re Murdock*, 4 N. B. R. 17; In *re Mackay*, 4 N. B. R. 17; Fed. Cas. 8,887.

11. A bankrupt preserved the invoices of his purchases, receipts of his payments, a bank book and canceled checks, and a daily memorandum of cash receipts on a slate, which were erased each succeeding day. *Held*, that he did not keep proper books of account. In *re Solomon*, 2 N. B. R. 94; 6 Phila. 481; 25 Leg. Int. 364; 1 Chi. Leg. News, 77, 107; Fed. Cas. 13,167.

12. Entries of business transactions on slips of paper, each entry being on a separate slip, is not a keeping of books of account as required by the bankrupt law. In *re Hammond v. Coolidge*, 3 N. B. R. 71; 1 Lowell, 381; Fed. Cas. 5,999.

## III. WHO MUST KEEP.

13. If he would be discharged from his obligations in bankruptcy, a merchant must keep such books of account as will at all times exhibit to his creditors his position, so that when placed before them for investigation they may at once ascertain his standing and property, and the result of his business, and whether everything has been fair and honest on his part. In *re Brockway*, 7 N. B. R. 595; 6 Ben. 326; Fed. Cas. 1,917.

14. The fact that a merchant or tradesman does not keep proper books of account is a cause for refusing to discharge him in bankruptcy, whether the intent be fraudulent or not. In *re Archibrown*, 12 N. B. R. 17; 7 Chi. Leg. News, 231; Fed. Cas. 505.

15. A livery-stable keeper who only buys horses to hire, and sells them only when no longer fit for the purposes, and who boards horses for others, buying the grain for that

purpose, must keep books of account, or an application for discharge will be refused. In *re Odell et al.*, 17 N. B. R. 73; 9 Ben. 209; Fed. Cas. 10,426.

16. A bankrupt's discharge was opposed on the ground that, being a tradesman, he had not kept proper books of account. The evidence showed him to be a farmer, who also periodically purchased and sold horses, cattle, etc. He was unable to write and had never kept books. The discharge was granted; it being held he was not a tradesman. In *re Cote*, 14 N. B. R. 508; 2 Lowell, 374; Fed. Cas. 8,267.

17. Where it appears that a bankrupt has failed to keep proper books of account, the case is one in which, under section 29 of the bankrupt act of 1867, a discharge cannot be granted. In *re Bound*, 4 N. B. R. 164; Fed. Cas. 1,697.

18. A bankrupt, who was a merchant and illiterate, kept no books of account except a small memorandum book of sales in which the entries were made by his son, daughter, and even strangers purchasing goods of him, but relied chiefly upon his memory as to his business transactions. *Held*, that he did not keep proper books of account and a discharge must be refused. In *re Newman*, 2 N. B. R. 99; 3 Ben. 20; 1 Chi. Leg. News, 123; Fed. Cas. 10,175.

19. The failure of a merchant or tradesman to keep proper books of account is ground for withholding a discharge in bankruptcy, although such omission may not have been wilful. *Id.*

20. An omission by a merchant or tradesman to keep proper books of account, even without fraudulent intent, is ground for withholding a discharge under the act of 1867. In *re Solomon*, 2 N. B. R. 94; 6 Phila. 481; 25 Leg. Int. 364; 1 Chi. Leg. News, 77, 107; Fed. Cas. 13,167.

21. Where it clearly appeared that the assignee could have no reason to inquire into a trade formerly carried on by bankrupt, failure of bankrupt to keep proper books of account will not bar his discharge. In *re Keach*, 3 N. B. R. 3; 1 Lowell, 335; Fed. Cas. 7,629.

22. A bankrupt, being a merchant and tradesman, had not, subsequent to the passage of the act of 1867, kept either invoice-

book, cash-book, blotter, day-book, journal or ledger, the only accounts being memoranda. *Held*, that he had not kept proper books of account, and a discharge was refused. In *re Schumpert*, 8 N. B. R. 415; Fed. Cas. 12,491.

23. Persons who buy on credit, and sell again in such wise as to be merchants or tradesmen, must, under the act of 1867, keep such books in relation to their business as will give an intelligible account to their creditors of the state of their business transactions. Otherwise, discharges will be refused them. In *re Garrison*, 7 N. B. R. 287; 5 Ben. 430; Fed. Cas. 5,254.

24. A bankrupt in June, 1867, sold the whole interest in his store. His petition in bankruptcy was filed in February, 1868. Between June and February he was out of business, except that he bought and sold apples, partly on his own account, and partly on a joint enterprise with another. He kept no books of account. *Held*, that the omission to keep such books prevented the granting of his discharge. In *re Tyler*, 4 N. B. R. 27; Fed. Cas. 14,305.

25. Discharges cannot be given to bankrupts who have not kept proper books of account and whose entries of receipts and disbursements in cash books are unintelligible. In *re Murdock et al.*, 4 N. B. R. 17.

26. Failure to keep a cash book is a sufficient ground for refusing to grant a discharge to a bankrupt trader. In *re Littlefield*, 3 N. B. R. 13; 1 Lowell, 331; 2 Amer. Law T. 122; 1 Amer. Law T. Rep. Bankr. 164; Fed. Cas. 8,998; In *re Gay*, 2 N. B. R. 114; 1 Hask. 108; 1 Amer. Law T. Rep. Bankr. 73; 2 id. 52; Fed. Cas. 5,279; In *re Bellis & Milligan*, 3 N. B. R. 124; 4 Ben. 53; Fed. Cas. 1,275.

29. A bankrupt kept no cash book. He had an account with "merchandise" in his ledger, showing in one column aggregate monthly payments for grain, and in another aggregate monthly amount of sales. The books did not show what moneys were expended in carrying on business nor what sums were taken out for family expenses. *Held*, that the books were insufficient and a discharge should be refused. In *re Anketell*, 19 N. B. R. 268; Fed. Cas. 894.

30. The accidental omission of entries in a trader's books of account is no ground for

withholding a discharge. In *re Burgess*, 3 N. B. R. 47; Fed. Cas. 2,153.

31. A bankrupt who has sold certain articles to raise money, but without intention of buying others to sell again, is not a merchant, and failure to keep proper books of account will not prevent his discharge. In *re Rogers*, 3 N. B. R. 139; 1 Lowell, 428; Fed. Cas. 12,001.

32. Bankrupts bought and sold hemlock bark and lumber. They kept no cash book, but kept bank books showing amounts received and to whom paid. *Held*, that such books were proper. In *re Marsh et al.*, 19 N. B. R. 297; Fed. Cas. 9109.

33. Where material erasures and alterations appear on the books of a bankrupt, unless it appear that they were made with fraudulent intent, a discharge will not be refused. In *re Antisdel*, 18 N. B. R. 289; Fed. Cas. 490.

34. The mutilation of books of account, if satisfactorily explained, is no bar to a discharge. In *re Nooman & Connolly*, 3 N. B. R. 63; Fed. Cas. 10,291; In *re Pierson*, 10 N. B. R. 10.

35. Objections were made to a discharge on the ground that the bankrupt failed to keep proper books of account in another business. *Held*, that such objections were invalid. In *re Friedberg*, 19 N. B. R. 302; Fed. Cas. 5,116; In *re Herdic*, 19 N. B. R. 385; Fed. Cas. 6,403.

37. Prior to filing his petition, the account books of the bankrupt covering the time before he entered trade were destroyed by fire, but their contents had not been transferred to the books in which his trade accounts were kept. *Held*, not sufficient ground to deny a discharge. In *re Winsor*, 16 N. B. R. 152; 9 Chi. Leg. News, 402; 2 Cin. Law Bul. 212; Fed. Cas. 17,885.

38. A bankrupt was a stock and gold broker, but was not a member of the Stock Exchange, and conducted business through other brokers who were members. On objection to his discharge on the ground that, being a "merchant or tradesman," he kept no books of account, *held*, that he was not a "merchant or tradesman" within the meaning of the act of 1867. In *re Moss*, 19 N. B. R. 132; Fed. Cas. 9,877.

39. A bankrupt's discharge was opposed under the act of 1867 on the ground that, being a tradesman, he had not kept proper

books of account. The evidence showed him to be a farmer, who also periodically purchased and sold horses, cattle, etc. He was unable to write and had never kept books. The discharge was granted, it being held he was not a tradesman. In re Cote, 14 N. B. R. 508; 2 Lowell, 374; Fed. Cas. 3,267.

#### IV. HOW TO OBTAIN.

40. If the bankrupt has the actual possession of joint estate and joint books of account, he must disclose them to his separate assignee, and, if he wilfully fail to do so, is not entitled to the charge. In re Beal, 2 N. B. R. 178; 1 Lowell, 323; 1 Chi. Leg. News, 326; Fed. Cas. 1,156.

41. To obtain possession of books of account which passed to assignee of bankrupt's own selection, the assignee in bankruptcy must proceed by bill in equity or action at law. Rogers, Ass., v. Winsor, 6 N. B. R. 246; Fed. Cas. 12,023.

42. The district court will order the production of books and papers at the summary hearing on the return day of order to show cause. In re Mendenhall, 9 N. B. R. 285; Fed. Cas. 9,423.

#### BREACH OF PROMISE.

A judgment obtained on a breach of a promise to marry is barred by the discharge of the bankrupt. In re Sidle, 2 N. B. R. 77; Fed. Cas. 12,844.

#### BREACH OF TRUST.

See TRUST.

#### BUSINESS.

See PLACE OF BUSINESS.

#### BUSINESS CORPORATIONS.

See CORPORATIONS, 4

#### CARRYING ON BUSINESS.

See PLACE OF BUSINESS.

#### CERTIFICATION.

I. WHO MAY REQUIRE.

II. WHEN MAY BE REQUIRED.

III. WHEN MAY NOT BE REQUIRED.

IV. WHAT MAY BE CERTIFIED.

See PLEADING AND PRACTICE, 278.

#### I. WHO MAY REQUIRE.

1. Only a party to the proceedings before the register can take the opinion of the district judge on a certificate of the register on a matter arising in the course of such proceedings, or upon the result of them. The word "party" means the bankrupt or a creditor of his. In re Fredenburg, 1 N. B. R. 34; 2 Ben. 133; Fed. Cas. 5,075.

#### II. WHEN MAY BE REQUIRED.

2. A question in order to be properly certified to the judge must arise regularly in the course of proceedings before the register and between the parties having the legal right to raise it. In re Wright, 1 N. B. R. 91; Fed. Cas. 18,069; In re Peck, 3 N. B. R. 186.

3. A court will not in all cases refuse to entertain a question as to charges of a register, upon a certificate of the register of his own motion, especially where no objection is made by the parties to the certification. In re Sherwood, 1 N. B. R. 74; 25 Leg. Int. 76; 1 Amer. Law T. Rep. Bankr. 47; 6 Phila. 461; Fed. Cas. 12,774.

#### III. WHEN MAY NOT BE REQUIRED.

4. Neither court nor register can be the general adviser of the assignees as to their acts, and no opinion will be given on abstract questions certified to the judge by the register. In re Sturgeon, 1 N. B. R. 181; 2 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 13,564; In re Haskell, 4 N. B. R. 181; Fed. Cas. 6,191.

5. Before the time for filing specifications in opposition to discharge, and upon the examination of the bankrupt, the testimony appeared to show that a creditor had been paid money by the bankrupt to procure his consent to the discharge, and the register thereupon certified the question as to the effect of such testimony. The court held

the certification premature and declined to pass upon it. In re Mawson, 1 N. B. R. 83; 2 Ben. 122; Fed. Cas. 9,817.

6. When creditor opposes amendment of schedules he does not raise a question requiring certification. In re Watts, 2 N. B. R. 145; 3 Ben. 166; Fed. Cas. 17,298.

#### IV. WHAT MAY BE CERTIFIED.

7. On certification by the register to the court as to whether holder of a note may prove it in full against the bankrupt promisor's estate, notwithstanding receipt by him of a sum of money from the indorser in discharge of indorser's liability, *held*, that he may, refunding to latter the excess of sum due holder. In re Souther, 9 N. B. R. 502; 2 Lowell, 320; Fed. Cas. 13,184.

8. Written objections having been filed by the assignee to a proof of debt, a hearing was had before the register. At this hearing the assignee offered no testimony, but asked to have the matter certified to the court. *Held*, register required to certify it. In re Clark & Bininger, 6 N. B. R. 202; Fed. Cas. 2,808.

9. A register holding provisionally a court of bankruptcy, before whom a witness refuses to answer a question propounded, should, if he believes the question a proper one, so declare. If an exception to this provisional ruling is taken, he should certify it for the summary consideration of the court, the examination proceeding in its other parts. If the witness, without such exception, refuse to answer, his contumacy should be reported. In re Reakirt, 7 N. B. R. 329; Fed. Cas. 11,614.

10. Issue of fact or law raised as to satisfactory character of proof of debt should be certified. In re Bogert & Evans, 2 N. B. R. 189; 38 How. Pr. 111; 1 Chi. Leg. News, 211; Fed. Cas. 1,598.

#### CESTUI QUE TRUST.

See TRUST.

#### CHAMPERTY.

See ATTORNEYS; CLAIMS, 128.

#### CHATTEL MORTGAGE.

See MORTGAGE, XI.

#### CHECK.

See COMMERCIAL PAPER.

#### CHOSSES IN ACTION.

I. BELONGING TO WIFE.  
II. IN GENERAL.

##### I. BELONGING TO WIFE.

1. The wife of a bankrupt, as the residuary legatee of her father, had become the owner of a liberal estate in stocks, bonds and other choses in action, but the bankrupt had never reduced them to his possession. *Held*, that as they had not been reduced to possession by the husband, his assignee in bankruptcy had no power over them. Wickham, Ass. v. Valle's Executors, 11 N. B. R. 83; Fed. Cas. 17,618.

2. A *feme sole*, owning a chose in action, married, and a suit was instituted to recover, in the name of the husband and wife. While still pending, the husband was declared bankrupt and assignee was appointed, who was made party plaintiff with the wife and recovered judgment. *Held*, assignee may enforce judgment and distribute the money among the creditors. In re Boyd, 5 N. B. R. 199; 2 Hughes, 849; Fed. Cas. 1,745.

3. Marriage constitutes a qualified gift to the husband of the wife's choses in action, upon condition that he reduce them to possession during its continuance. The chose in action continues to belong to the wife. In re Boyd, 5 N. B. R. 199; 2 Hughes, 849; Fed. Cas. 1,745.

4. A wife cannot give a discharge of a chose in action. If the debtor pay the money to the wife without the husband's authority, he may be forced to pay it over again to the husband. *Id*.

##### II. IN GENERAL.

5. A party who purchases a chose in action from the assignee cannot maintain an



action thereon in his own name in a state court, where the laws of the state do not permit an assignee of a chose in action to sue in his own name. *Leach v. Greene*, 13 N. B. R. 376.

6. If the proceedings in bankruptcy are discontinued without the appointment of an assignee, a party who took an assignment of a chose in action from the bankrupt after the commencement of such proceedings may maintain an action thereon. *Kline v. Bauendahl*, 13 N. B. R. 575.

7. Where action is brought to reach choses in action, or property not subject to sale on execution, weight of authority holds that lien is acquired by the mere commencement of the action. *Johnson, Ass. v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

8. Motion to expunge order for sale of such choses in action belonging to estate of bankrupt as "could not be collected without inconvenient delay or expense," made by register. *Held*, that register had power to make such order. In re *The Bank of North Carolina*, 19 N. B. R. 164; Fed. Cas. 896.

9. A chose in action which is not negotiable, and on which the assignee must sue in the name of the assignor, does not become a mutual debt or credit in the hands of the assignee, so as to be a matter of set-off. *Rollins, Ass. v. Twitchell & Co.*, 14 N. B. R. 201; 2 Hask. 66; 5 Amer. Law Rec. 247; Fed. Cas. 12,027.

## CLAIMS.

### I. IN GENERAL.

### II. FIDUCIARY.

### III. FRAUDULENT.

### IV. IN COMPOSITION PROCEEDINGS.

### V. JURISDICTION OF COURT OVER.

### VI. PROCEDURE AFTER REJECTION.

### VII. PREFERENCES.

- (a) *In General.*
- (b) *Moiety Provable.*
- (c) *Recovery by Trustee.*
- (d) *Surrender of.*

### VIII. PRIORITY OF.

- (a) *In General.*
- (b) *Judgment.*

### VIII. PRIORITY OF—continued.

- (c) *Operatives.*
- (d) *Refused.*
- (e) *Rent.*
- (f) *State.*
- (g) *United States.*

### IX. PROVABLE.

- (a) *Defined.*
- (b) *In General.*
- (c) *Against or by Partnership.*
- (d) *Based on Commercial Paper.*
- (e) *By Wife.*
- (f) *Costs.*
- (g) *For Insurance.*
- (h) *For Interest.*
- (i) *For Judgment.*
- (j) *For Reduced Amount—Commercial Paper.*
- (k) *For Reduced Amount—General.*
- (l) *For Value of Goods.*

### X. NOT PROVABLE.

- (a) *In General.*
- (b) *Barred by Limitation.*
- (c) *Based on Commercial Paper.*
- (d) *By or Against Partnership.*
- (e) *By or Against Wife.*
- (f) *For Judgment.*
- (g) *Illegal.*
- (h) *Usurious.*

### XI. SET-OFF.

### XII. TO BE INCLUDED IN PETITION.

See ARREST, 7; BANK, 6, 13, 16; DISCHARGE, 12, 21, 39, 43, 46, 115-120, 136, 144, 195, 243-246, 250, 253, 258, 274, 277, 287, 288, 292, 294; DIVIDENDS, 20; ESTATES, 1, 71, 151, 212, 213, 246; EVIDENCE, 18, 97, 101, 103; EXECUTION, 16; LIEN, 3, 4, 24, 43, 47, 60, 68, 72, 93, 103, 110, 113, 116, 120; MORTGAGE, 8, 64, 94; NOTICE, 65; PLEADING AND PRACTICE, 10; REFEREE, 21, 22, 24, 32; SECURED CLAIMS, 3, 38, 39, 40, 50, 55, 57; STATUTORY CONSTRUCTION, 25; STOCKHOLDERS, 22; SURETY, 11.

### I. IN GENERAL.

1. A register made a report on a certain claim without recommending that it be allowed or disallowed. *Held*, he might amend the report in court. In re *Campbell*, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

2. A petitioning creditor may proceed to an adjudication notwithstanding a tender of the full amount of his claim and costs; but where the petitioner is the only creditor, proceedings against the debtor will be dismissed upon such tender. *In re Sheehan*, 8 N. B. R. 345; Fed. Cas. 12,737.

3. Where a creditor places his claim in the hands of a collection agent to forward for collection, he is not chargeable with the knowledge of a sub-agent employed by the latter, if he does not receive the proceeds of a judgment by confession obtained by him, although the proceeds were remitted to the collection agent. *Hoover, Ass. etc., v. Wise et al.*, 14 N. B. R. 264; 91 U. S. 308.

4. Where a dividend has been ordered on the claim of an attorney for alleged professional services rendered the bankrupt, the court will restrain the register and the assignee from making or paying such dividend until further order, to enable any one interested to apply to vacate the order for the dividend. *In re New York Mail Steamship Co.*, 3 N. B. R. 73; Fed. Cas. 10,212.

5. The mere filing of a petition in bankruptcy will not disable a creditor from suing on his unpaid claims. *Booth v. Meyer et al.*, 14 N. B. R. 575.

6. The power of marshaling assets will not be exercised to the material injury of the creditor holding a claim upon both funds. A mere delay or postponement of payment is not a material injury, the interest on the claim being an adequate compensation for delay. *In re Sauthoff & Olson*, 14 N. B. R. 364; 7 Biss. 167; 5 Amer. Law Rec. 173; 8 Chi. Leg. News, 370; 3 Cent. Law J. 544; 3 N. Y. Wkly. Dig. 96; Fed. Cas. 12,379.

7. The promise by which a discharged debt is revived must be clear and unequivocal, such promise not being contained in the following language: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay. All will be right betwixt me and my just creditors." *Allen & Co. v. Ferguson*, 9 N. B. R. 481; 18 Wall 1.

8. C., who had a claim for compensation for the destruction of a vessel by a Confederate cruiser equipped and sent out in England, transferred the claim to his wife when

he was free from debt. Afterward he became bankrupt. *Held*, that such claim could be transferred. *Williamson et al., Ass., v. Colcord and wife*, 13 N. B. R. 319; 1 Hask. 620; Fed. Cas. 17,752.

9. Where a creditor advances money to pay a valid execution and takes a judgment for his own claim and the money so advanced, an execution on such judgment will be void as to the old claim, but good as to the advance. *Lathrop v. Drake et al.*, 13 N. B. R. 472; 91 U. S. 516.

## II. FIDUCIARY.

See AGENT, 8, 12; TRUSTEE, 148, 168.

10. A debt created by fraud or embezzlement of the bankrupt or by his defalcation while acting in a fiduciary capacity is provable. *In re Rundle and Jones*, 2 N. B. R. 49; 1 Chi. Leg. News, 30; Fed. Cas. 12,188.

11. A claim for the proceeds arising from the sale of goods by a city auctioneer not accounted for by him is a debt not barred by a discharge, it being created while the debtor is acting in a fiduciary capacity, and the sureties on the auctioneer's bond are not released by his discharge. *Mayor et al. v. Walker et al.*, 11 N. B. R. 478.

12. A bankrupt is liable to arrest pending bankruptcy proceedings upon a debt created by his defalcation of the proceeds of goods sent to him to be sold on commission and for which he refuses to account. *In re Kimball*, 2 N. B. R. 74; s. c. (affirmed by circuit court), 2 N. B. R. 114; 2 Ben. 554; Fed. Cas. 7,768.

13. Where a factor buys stock for his principal and takes the same in his own name and deposits it to secure a loan made by himself, the principal is only entitled to share *pro rata* in a fund deposited by the factor for the redemption of the stock pledged. *Ungewitter v. Van Sachs, Ass.*, 3 N. B. R. 178; 4 Ben. 167; 1 Amer. Law T. Rep. Bankr. 224; 3 Amer. Law T. Rep. Bankr. 195; Fed. Cas. 14,343.

14. A consignment of goods was made, the consignee giving his acceptance for their value, payable partly at sight and partly at a future day, and agreed to account for the whole price, to guarantee the sales and to receive a commission, with other stipulations making him primarily liable. He became

bankrupt. *Held*, the claim was not of a fiduciary character. *Ex parte Flannagans*, 12 N. B. R. 230; 2 Hughes, 264; 14 Amer. Law Reg. (N. S.) 688; 4 Amer. Law Rec. 304; Fed. Cas. 4,855.

### III. FRAUDULENT.

See FRAUD, 22, 84.

15. A claimant in a bankruptcy proceeding may present a claim arising from fraud and receive his dividend, but may not prosecute it until the question of discharge is determined, but thereafter, whether the petitioner be discharged or not, it remains a valid claim, recoverable in any proper form of suit. *Stokes & Leonard v. Mason*, 13 N. B. R. 498.

16. A judgment was recovered for damages for the seduction of a daughter, there being no promise of marriage, and no acts or devices practiced which would amount to legal fraud on the father. *Held*, not a debt created by fraud. *Howland v. Carson*, 16 N. B. R. 872.

17. If a bankrupt put into his schedule, as due, a debt which is fictitious, it will, under the twenty-ninth section of the bankrupt act of 1867, prevent his obtaining a discharge, even though the debt be not proved. *In re Orcutt*, 4 N. B. R. 176; 5 Ben. 19; Fed. Cas. 10,550.

18. Evidence of fraud in the creation of a debt, sought to be introduced by a creditor, is inadmissible in proceedings in bankruptcy. *In re Tallman*, 1 N. B. R. 123; 2 Ben. 348; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 13,789.

### IV. IN COMPOSITION PROCEEDINGS.

See COMPOSITION, 59, 68, 96, 100.

19. In composition proceedings a creditor offered to vote without first proving his claim. *Held*, that he could not. *In re Mathers et al.*, 17 N. B. R. 225; Fed. Cas. 9,274.

20. A statement of assets and debts in proceedings for composition is not invalid because the bankrupt has omitted therefrom a claim which he believes, on the advice of counsel, to be worthless. *In re Reiman et al.*, 13 N. B. R. 128; 12 Blatch. 562; Fed. Cas. 11,675.

21. A creditor having demanded payment

in full in advance, as a condition of consenting to sign a composition agreement of the debtor to pay his creditors seventy cents on the dollar, was held liable to repay the amount to the assignee, and did so, and sought to prove his original claim, the composition having failed. *Held*, that under the circumstances he was entitled to do so. *Brookmire & Rankin v. Bean, Ass.*, 12 N. B. R. 217; 3 Dill 136; 2 Cent. Law J. 265; Fed. Cas. 1,942.

22. Agents of a manufacturer advanced him their notes, which he indorsed and had discounted. The agents became bankrupt and effected a composition, the creditors reserving the right to prove the amount of the notes against the other parties to them. On the bankruptcy of the manufacturer, *held*, that the holders of the notes need not give credit for the full amount received from the agents, but must abate their proof by the amount of the manufacturer's property appropriated in the composition. *Ex parte Harris et al.*, *In re Cochrane, Jr.*, 16 N. B. R. 432; 2 Lowell, 568; Fed. Cas. 6,109.

23. A debtor discharged in composition proceedings gave new notes for pre-existing ones to a creditor who signed the resolution. The debtor again went into bankruptcy. *Held*, that the claim so renewed was not to be postponed to claims of new creditors. *In re Merriman's Estate*, 18 N. B. R. 411; 44 Conn. 587; 26 Pittsb. Leg. J. 120; Fed. Cas. 9,479.

24. A bankrupt, having offered a composition, stated by petition that R. claimed a sum which he wholly denied. R.'s name and residence were scheduled with the statement that the claim was disputed. An action was pending in a state court upon the debt. The bankrupt prayed for thirty days after the determination of the action in which to offer the *pro rata* composition, or that the claim be proved. The petition was granted. *Ex parte Trafton*, 14 N. B. R. 507; 2 Lowell, 503; Fed. Cas. 14,133.

25. A claimant held notes indorsed by bankrupts. The makers were adjudged bankrupt and effected a composition June 11, 1878, and gave notes payable in three, six and nine months. The claimant refused the notes till September 25, 1878, when he accepted cash for the matured note and the other notes. On September 9, 1878, he proved for the whole

amount of the original notes. *Held*, that the proof was correct. In re Hicks et al., 10 N. B. R. 299; Fed. Cas. 6,456.

26. A composition authorized the bankrupts to continue in business under direction of a committee and in the firm name. The committee represented to a creditor that debts incurred subsequent to the composition would be paid in full before payment of the old indebtedness, but that the committee would not be personally liable. The business resulted disastrously. *Held*, that the new creditors were not entitled to preference. In re Brightman et al., 18 N. B. R. 566; 19 Alb. Law J. 55; Fed. Cas. 1,879.

27. An assignee will not be authorized by the court to compound debts for the purpose of compromising the same under direction of a committee of creditors, where all the creditors did not vote when such committee was appointed. In re Dibblee, 8 N. B. R. 17; 3 Ben. 354; Fed. Cas. 3,885.

#### V. JURISDICTION OF COURT OVER.

See COURTS, 245, 278; STAY OF PROCEEDINGS, 20.

28. By the receipt and filing of proof of debt, and by it alone, the court obtains jurisdiction of the claim and of the creditor presenting it, and then only does its revising power over such proof commence. The receiving and filing of proof of debt concludes nothing, and the power still remains in the court to revise and correct or reject it altogether. In re Merrick, 7 N. B. R. 459; Fed. Cas. 9,463.

29. The court has no discretion to refuse to receive and file a proof of debt which appears on its face to have been taken by a proper officer and to be correct in form and in substance. *Id*.

30. A proceeding to prove a debt against the bankrupt's estate is part of a suit in bankruptcy over which the supreme court had jurisdiction under the act of 1867, and not an independent suit at law or in equity. Leggett v. Allen, 110 U. S. 741.

31. Where a creditor presents his claim he at once subjects himself and his claim to the jurisdiction of the court, and becomes subject to its orders within the provisions of the bankrupt act, among which is the provision that the court may examine the cred-

itor concerning the debt sought to be proved. In re Paddock, 6 N. B. R. 396; Fed. Cas. 10,658.

32. Under the bankrupt act all existing heirs are fully protected, but their creditors must prove their demands and enforce their liens through the bankruptcy court. All the bankrupt's property is *in custodia legis* and subject to the order of the bankruptcy court. Davis v. Anderson, 6 N. B. R. 146; Fed. Cas. 3,623.

33. The claim of a creditor who has, under section 23 of the act of 1867, proved his debt and had the same allowed by the register after the appointment of a trustee to wind up the bankrupt's affairs under section 43 of that act, will be refused unless he applies directly to the court for the allowance of the same. In re Trowbridge, 9 N. B. R. 274; Fed. Cas. 14,191.

#### VI. PROCEDURE AFTER REJECTION.

34. The proof of a debt offered by a creditor was rejected by the district court, on objection by the assignee. *Held*, that the creditor should sue the assignee and thus establish his claim. Adams v. Meyers, 8 N. B. R. 214; 1 Sawy. 806; Fed. Cas. 62.

35. A claim which has been rejected by the assignee and returned to the register for further proof should not be ordered paid, without notice to the assignee and an opportunity given to answer the creditor's petition. In re Mittedorfer & Co., 3 N. B. R. 9; Chase, 276; Fed. Cas. 2,674.

36. Creditors inhibited from proving their debts will be excluded from voting for an assignee. In re Stevens, 4 N. B. R. 122; 4 Ben. 513; Fed. Cas. 13,391.

37. The assignee may withhold payment of a dividend on a particular claim where its declaration is unauthorized. In re Herrick and Herrick, 13 N. B. R. 312; Fed. Cas. 6,420.

#### VII. PREFERENCES.

See PREFERENCES, 7, 20, 25, 37, 83, 125, 145, 186, 195, 199, 202.

##### (a) *In General.*

38. In respect to the right to prove a claim, it makes no difference whether a transfer claimed to be a preference is constructively fraudulent under the bankrupt act or

under the statute of Elizabeth. *Burr v. Hopkins, Ass.*, 12 N. B. R. 211; 6 Biss. 845; 7 Chi. Leg. News, 266; Fed. Cas. 2192.

39. H., who had received a preference for a certain debt, offered proof of other debts against the bankrupt which were not due at the time the preference was given. *Held*, that the same were not affected by the preference. *In re Arnold*, 2 N. B. R. 61; Fed. Cas. 551.

40. A creditor who has accepted a conveyance which defeats or delays the operation of the bankrupt act may not participate in the election of an assignee, and proof of his claim will be postponed until after the assignee is chosen; but creditors who have only assented to such transaction after its consummation may vote. *In re Chamberlain & Chamberlain*, 3 N. B. R. 173; Fed. Cas. 2,574.

41. If a preferred creditor have two separate claims and receive a preference on one of them alone, he may prove the other. *In re Lee*, 14 N. B. R. 89; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,179.

42. To a bill by the assignee to set aside a mortgage given by the bankrupt to secure a pre-existing indebtedness,—suit by the government being, at the time of such giving, pending against the insolvent, on which judgment was obtained,—an answer replied that the claim of the government was merged in the judgment. *Held*, that the liability existing at the time of the giving of the mortgage was the debt, and, the subsequent judgment being neither a satisfaction nor a payment of it, the mortgage was void. *Burfee v. First Nat. Bank of Janesville*, 9 N. B. R. 314.

43. A. purchased logs from a bankrupt and took an assignment of a note given by the bankrupt to B., with intent to obtain a preference for B. *Held*, that A. held the note in trust for B., and that the proof of debt should be expunged. *In re Stein*, 16 N. B. R. 569; Fed. Cas. 13,352.

44. A., within four months of filing a petition, made an assignment of all his goods in trust to B. and C., to pay their claims in full, and other creditors were to be paid if there were sufficient funds, and if not, *pro rata*. *Held*, that the assignment was void; that B. and C. had notice of A.'s insolvency, and should not be allowed to prove or share in the estate. *Stobaugh v. Mills & Fitch*, 8 N. B. R. 361; 5 Chi. Leg. News, 526; 2 Amer.

Law Rec. 666; 5 Leg. Op. 139; Fed. Cas. 13,461.

45. An open running account consisting of items of charges and credits at different times, on which was credited the amount at which property was purchased by way of fraudulent preference, leaving a balance proved before the register against the bankrupt's estate, was held *prima facie* to be but a single debt, and by reason of such preference not entitled to a dividend on any part thereof. *In re Richter's Estate*, 4 N. B. R. 67; 3 Chi. Leg. News, 33; 1 Dill. 544; Fed. Cas. 11,803.

46. A preference will not bar the proof of a debt unless it was given and received by the parties to such debt. *In re Comstock & Co.*, 13 N. B. R. 110; 3 Sawy. 320; Fed. Cas. 3,079.

47. A. & Co. advanced money to C. and D., and expected in return to receive their cotton. A. obtained judgment for the amount due his firm. A motion was made in bankruptcy proceedings to expunge the debt of A. & Co. *Held*, that they had reasonable cause to believe their debtors insolvent before obtaining their judgment, and that shipments of cotton after the insolvency, when advances were made at the time to the bankrupts, were not a preference, but a sale. *Harrison v. McLaren*, 10 N. B. R. 244; Fed. Cas. 6,139.

#### (b) *Moiety Provable.*

48. A creditor of a bankrupt, knowing he was insolvent, received preferences, and afterwards filed his claim for the amounts due him from the bankrupt. *Held*, that he could prove only a moiety of the debt. *In re Schoenberger*, 15 N. B. R. 305; Fed. Cas. 12,478.

49. A creditor of an insolvent firm, with knowledge of such insolvency, procured a member of the firm to make his promissory note, secured by mortgage of individual property, in payment of the firm debt. *Held*, that such payment was a preference and that the creditor could only prove a moiety of the debt against the firm. *In re Parker et al.*, 19 N. B. R. 340; Fed. Cas. 10,721.

#### (c) *Recovery by Trustees*

50. The payment by creditors of a decree obtained against them in a suit by the as-

signee to recover a preference is not a surrender and they are not entitled to prove their debt. In re Tonkin & Trewartha, 4 N. B. R. 18; 8 Amer. Law T. 221; 1 Amer. Law T. Rep. Bankr. 232; Fed. Cas. 14,094.

51. The prohibition of the creditor to prove his debt, in section 39 of the act of 1867, applies to cases where he has refused upon demand to surrender his preference, and compelled the assignee to recover by suit the money or property claimed and held by him in fraud of the provisions of the act. He may surrender his preference under either section 35 or 39 and prove his debt before a recovery against him by judgment, but after a recovery he is not permitted to prove under either. In re Hunt & Howell, 5 N. B. R. 433; Fed. Cas. 6,882.

52. An assignee in bankruptcy recovered a judgment against a preferred creditor, setting aside the preference. The creditor then sought to prove his claim. *Held*, that the claim could not be proved. In re Cramer, 13 N. B. R. 225; 8 Chi. Leg. News, 106; Fed. Cas. 3,345.

53. A bankrupt as executor received \$11,320. Less than four months prior to filing his petition he made a mortgage for the amount on his real estate to himself as executor. Afterwards a prior mortgage was foreclosed. The later mortgage was held to be in fraud of the bankrupt law and void. Afterwards the bankrupt proved for the debt. *Held*, that there was no voluntary surrender of the mortgage and that he could not prove for any part of the debt. In re Dakin, 19 N. B. R. 181; Fed. Cas. 3,539.

54. Creditors who had been preferred by the bankrupts offered the same debt for proof, the preference having been recovered by the assignee and paid on execution. The debt was admitted for proof. In re Black et al., 17 N. B. R. 399; Fed. Cas. 1,459.

#### (d) *Surrender of.*

55. A preferred creditor may prove his debt after a surrender of the preference, unless a recovery has been had against him, under sections 35 and 39 of the bankrupt act of 1867. In re Scott & McCarty, 4 N. B. R. 139; Fed. Cas. 12,518.

56. The right of a preferred creditor to

prove his debt is conferred by the bankrupt act of 1867, independent of the second clause of section 23 of that act, the operation of that clause being merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided; and in the construction of this clause it makes no difference whether the petition be voluntary or involuntary. *Id.*

57. A creditor who, knowing the condition of his insolvent debtor, receives payments, accepts a fraudulent preference, and cannot prove his claim if he refuses to surrender the preference. In re Forsythe and Murtha, 7 N. B. R. 174; Fed. Cas. 4,948; In re Clarke & Doughtrey, 10 N. B. R. 21; 2 Hughes, 405; Fed. Cas. 2,843; Ecker v. McAllister, 17 N. B. R. 42.

58. If the debt be single and entire, or consist of separate and disconnected debts, and a preference is received on account of them all, no portion can be proved without a previous surrender, and if proved, it will, on application, be expunged. In re Holland, 8 N. B. R. 190; Fed. Cas. 6,604.

59. A preferred creditor cannot prove his debt, or any part of it, until he has voluntarily, or by compulsion, surrendered his preference. In re Currier, 18 N. B. R. 68; 2 Lowell, 436; Fed. Cas. 3,492.

60. A creditor secured by a deed of trust in the nature of a preference, but who disclaims any interest thereunder, may prove his claims unsecured. In re Saunders, 13 N. B. R. 164; 2 Lowell, 444; Fed. Cas. 12,371.

61. Where one is both creditor and trustee under the trust giving him a preference, he is presumed, by receiving delivery of the trust deed without express qualification, to assent to it, and cannot prove his debt in bankruptcy without a complete surrender of his preference. *Id.*

62. A creditor who had obtained a preference by taking goods from the debtor paid a judgment obtained by the assignee in bankruptcy for the value of the goods, and then proved his claim against the estate. *Held* that, there being no actual fraud, the claim could be proved, the payment being a surrender of the preference. In re Newcomer, 18 N. B. R. 85; 10 Chi. Leg. News, 347; 26 Pittsb. Leg. J. 3; Fed. Cas. 10,148.

63. If the assignee accept the amount re-

ceived by a preferred creditor after he has put in his proof, and the creditor has been put in proof before the special examiner to whom the action has been referred, and dismisses his suit upon payment of costs, this constitutes a surrender, and such creditor may prove his debt. In re Riorden, 14 N. B. R. 333; Fed. Cas. 11,852.

64. Prior to the amendatory act of June, 1874, a voluntary surrender was a prerequisite to the right to prove, and it was too late for the creditor to avail himself of the privilege after he had elected to contest the assignee's title to the money or property preferentially received. In re Lee, 14 N. B. R. 89; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,179.

### VIII. PRIORITY OF.

See ASSIGNMENTS, 27; BANKS, 3, 4, 8.

#### (a) *In General.*

65. Preferred creditors can have priority in payment only out of assets that pass to the assignee in bankruptcy. In re Chamberlin, 17 N. B. R. 50; 9 Ben. 149; Fed. Cas. 2,580.

66. A bankrupt had no assets of real value; a creditor entitled to preference objected to a confirmation of the composition unless his claim be paid in full or unless the confirmation be had subject to his claim. *Held*, that his priority extended only to the assets. *Id.*

67. Where the bankrupt has made an agreement to pay for certain services which are of benefit to the other creditors, such claim will be preferred. In re Nounnan & Co., 6 N. B. R. 579.

68. When a mortgagee has proved his claim in bankruptcy proceedings he will be entitled to preference out of the funds realized from the sale of the mortgaged property, and if an action to foreclose become necessary he should first obtain leave of the court. Schulze, Ass. etc., v. Bolting, 17 N. B. R. 167; 8 Biss. 174; Fed. Cas. 12,489.

69. A indorsed B's note, and to indemnify him against loss B assigned to A a bond for title to a tract of land. *Held*, that A had priority over judgment creditors of B in his claim to the proceeds of B's interest in the land. In re Reynolds, 16 N. B. R. 158; Fed. Cas. 11,724.

70. The creditors of the firm of A. & C. are entitled to priority of payment out of the

assets as to property acquired from the firm of A. & B. by a dissolution of that firm under an agreement by A. to pay certain partnership debts with reference to it and against those debts. Such debts are to be paid out of any surplus due A. from a sale of the property. Crane, Ass. etc., v. Morrison et al., 17 N. B. R. 393; 4 Sawy. 188; Fed. Cas. 3,353.

71. Where the separate estate of the wife of a bankrupt had been used to erect a house, with an agreement that the deed to the house and land be made to the wife, and where the wife voluntarily submitted to the bankruptcy proceedings, it was held the wife's claim should be paid out of the proceeds of the sale prior to judgment creditors. In re Campbell, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,848.

72. When a man and his wife hold themselves out to the world as partners in trade and the firm becomes bankrupt, the partnership creditors are entitled to be paid in preference to individual creditors of the husband out of the partnership assets. In re Kinkad, 7 N. B. R. 439; 3 Biss. 405; 7 West. Jur. 110; 6 Amer. Law T. Rep. 45; 5 Chi. Leg. News, 217; 1 Amer. Law Rec. 533; 3 Bench & Bar (U. S.), 41; Fed. Cas. 7,824.

73. Costs and expenses of bankruptcy proceedings are entitled to priority of payment out of funds in court derived from the sale of the bankrupt's property. In re Whitehead, 2 N. B. R. 599; 1 Chi. Leg. News, 326; Fed. Cas. 17,562.

74. Where, by the articles of association, a seat in a stockholders' board is, on the insolvency of a member, to be sold, and the proceeds applied first to the payment of debts due other members, the assignee in bankruptcy will take only the balance after payment of such debts. Hyde v. Woods, 10 N. B. R. 54; 2 Sawy. 655; Fed. Cas. 6,975.

75. The twenty-eighth section of the bankrupt act of 1867 does not give to the five classes of creditors therein enumerated any priority over secured creditors. In re McConnell, 9 N. B. R. 387; 10 Phila. 287; 31 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

#### (b) *Judgment.*

76. A debtor made a general assignment, subsequent to which a creditor obtained judgment and levied on the goods in the hands of the assignee. A petition was then filed

against the debtor and he was adjudged a bankrupt. The claim of the execution creditor took precedence over the claim of the assignee in bankruptcy. *McDonald, Ass., v. Moore et al.*, 15 N. B. R. 26; 8 Ben. 579; 1 Abb. N. C. 53; 23 Int. Rev. Rec. 25; 3 N. Y. Wkly. Dig. 461; 24 Pittsb. Leg. J. 88; Fed. Cas. 8,763.

77. There being no dispute as to the validity of judgments under which executions were issued and levy made, execution creditors are entitled to satisfaction out of proceeds of goods levied on by sheriff and afterwards seized by a United States marshal under warrant in bankruptcy. *Swope et al. v. Arnold, Ass.*, 5 N. B. R. 148; Fed. Cas. 18,702.

78. A. commenced an action against a debtor and levied an attachment upon his land. Another creditor obtained judgment afterwards and levied execution on the same land. The debtor filed a petition in bankruptcy, and sale of the land was enjoined. It was sold by the assignee, and the amount received was enough to pay both judgments. *Held*, that A. was entitled to priority, as his judgment lien related back to the service of the attachment. *Hudson, Ass., v. Adams*, 18 N. B. R. 102; 3 Cin. Law Bul. 1,066; Fed. Cas. 6,832.

79. Where one creditor claims a lien by virtue of a judgment recovered in November, 1866, and recorded in October, 1867, and another creditor holds a mortgage executed and recorded April, 1867, the mortgage lien has priority over the judgment. *In re Lacy*, 4 N. B. R. 62; Fed. Cas. 7,970.

80. Costs on attachment, if a lien by state law, constitute a preferred claim. *In re Hay et al.*, 7 N. B. R. 344; 2 Lowell, 180; Fed. Cas. 6,253.

#### (c) *Operatives.*

81. By the New Jersey laws landlords and operatives are on an equal footing as to preferred claims and the payment of such claims *pro rata*. *In re McConnell*, 9 N. B. R. 387, 10 Phila. 287; 81 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

82. A bankrupt being unable to pay for labor rendered within six months prior to adjudication settled with the workmen, who assigned their settled accounts to B, who presented the assigned claims for proof and

demand the rights of priority allowed workmen's claims. *Held*, that the claims should be allowed. *In re Brown*, 8 N. B. R. 177; 4 Ben. 142; Fed. Cas. 1,974.

83. Privileged debts may be paid as soon as the assignee receives enough money for that purpose, if the general creditors agree. Where there are privileged debts due workmen, the assignee has no right to waste their money in litigation for the supposed benefit of the general creditors. *In re Sawyer*, 16 N. B. R. 460; 2 Lowell, 551; 15 Alb. Law J. 280; Fed. Cas. 12,396.

84. Where an employee is thrown out of employment by the bankruptcy of his employer, and has been paid for the time he actually worked, he is not entitled to priority in payment for the time during which he was unable to find other employment. *In re Pevear et al.*, 17 N. B. R. 461; Fed. Cas. 11,053.

85. Upon proof of claims made by the father of a minor son, for the labor of such son as an operative within the six months next preceding the first publication of the notice of proceedings in bankruptcy, *held*, that the father may be preferred to an amount not exceeding \$50. *In re Harthorn*, 4 N. B. R. 27; Fed. Cas. 6,162.

86. A. having been employed to examine the books of B, who afterwards became bankrupt, asked to have his bill for services put on the footing of a privileged debt under section 5101 of the Revised Statutes, providing that wages due to any clerk shall be preferred. *Held*, that his claim was privileged. *Ex parte Rockett*, 15 N. B. R. 95; 2 Lowell, 522; Fed. Cas. 11,977.

#### (d) *Refused.*

87. A creditor proved his claim on a judgment which by the laws of the state created no lien on the property of the debtor. *Held*, he was not entitled to priority. *In re Cozart*, 3 N. B. R. 126; Fed. Cas. 3,813.

88. A. & Co. employed B. to perform services, and afterwards went into bankruptcy. *Held*, that as the services performed by B. were before proceedings in bankruptcy were commenced, they were therefore not in aid of such proceedings or of the assignee, and he cannot be considered a preferred creditor. *In re Nounnan & Co.*, 7 N. B. R. 15.



89. Contained in the schedule of debts of a bankrupt was one for legal services in preparing the petition and schedules and advice in relation thereto. Proof was filed of the claim. It was held not to be such as are embraced in section 28 of the act of 1867. In re Heirschberg, 1 N. B. R. 195; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 6,329.

90. A petition was filed for allowance as a preferred claim of attorney's fees for preparing the petition and schedules in bankruptcy. *Held*, it is not a preferred claim, but reimbursement was ordered for money advanced for the marshal's fee. In re Gies, 12 N. B. R. 179; 7 Chi. Leg. News, 379; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 5407.

91. An attorney claimed priority for services rendered before the beginning of bankruptcy proceedings, in defending a suit. *Held*, that he was a general creditor. In re Handell, 15 N. B. R. 71; Fed. Cas. 6,017.

92. Costs incurred in an attachment suit in a state court cannot be paid by the assignee in bankruptcy as a preferred debt, unless by the state law such costs are a lien against the property attached. In such a case the sheriff is the agent of the plaintiff in the action and must look to him for his fees and expenses. Gardner, Deputy Sheriff, v. Cook, Ass., 7 N. B. R. 346; Fed. Cas. 5,226.

93. Where an execution creditor has been enjoined, in aid of proceedings in bankruptcy, he may, if he elect to do so, have his claim of priority of payment out of the proceeds of sales of the property upon which his execution is alleged to have been a lien determined at a general meeting of creditors. Where the bankrupt has suffered his creditor, who had reasonable ground for believing him insolvent, to obtain judgment, his claim for priority should be disallowed. In re Dunkle and Driesbach, 7 N. B. R. 72; Fed. Cas. 4,160.

94. An internal revenue tobaccoist's bond upon which individual members of a partnership are sureties is not entitled to priority of payment out of the partnership assets of the estate of the copartnership in bankruptcy. In re Webb et al., 2 N. B. R. 183; 2 Amer. Law T. Rep. Bankr. 87; 9 Int. Rev. Rec. 169; 16 Pittsb. Leg. J. 43; Fed. Cas. 17,313.

95. A bank suspended payment, but subsequently re-opened and received new deposits which were not kept separate, though the bank had advertised that they would be received as special deposits. It again failed and was adjudged an involuntary bankrupt. *Held*, that the new deposits were not special, and the depositors must take as general depositors. In re Mut. Bldg. Fund Society, etc., 15 N. B. R. 44; 2 Hughes, 374; 5 Amer. Law Rec. 571; Fed. Cas. 9,976.

### (e) Rent.

See RENT, 23, 89.

96. When a landlord makes a demand upon the assignee, before the removal of the goods, for an amount not exceeding a year's rent, it should, if unpaid, be admitted as entitled to priority of payment whether the right of distraining exists or not. In re Ap-pold, 1 N. B. R. 178; 7 Amer. Law Reg. (N. S.) 624; 6 Phila. 469; 25 Leg. Int. 180; 1 Amer. Law T. Rep. Bankr. 83; Fed. Cas. 499.

97. A grocer was adjudicated a bankrupt. On the day set by the assignee for the sale of the goods on the premises, a bailiff of the landlord distrained for two quarters' rent. The goods were then sold, the proceeds being held subject to the claim for rent. The claim was allowed. *Id*.

98. A lessor who leased a storehouse to a bankrupt prior to adjudication, the assignee retaining possession, and the lessor having had a lien for rent on the goods stored, which he might have enforced at his pleasure, has a preferred claim for his rent. In re Rose, Lyon & Co., 3 N. B. R. 63; 1 Balt. Law Trans. 625; Fed. Cas. 12,048.

### (f) State.

99. A bank owed debts to the state and also taxes levied under the laws of the state. *Held*, that the taxes had priority over the other claims, but that for a debt other than taxes the state had no preference over other creditors of the same class. In re Brand, 3 N. B. R. 85; 2 Hughes, 384; 2 Amer. Law T. Rep. Bankr. 66; Fed. Cas. 1809.

100. A state need not prove its claim in bankruptcy to recover taxes due it on property of the bankrupt, and the bankrupt law cannot compel proof of such claim nor sell

the property so subject free from the tax lien. *Stokes v. State of Georgia*, 9 N. B. R. 191.

101. Where the preferred creditor was the state of New York by virtue of a bond given to the people of the state, and the moneys were to be turned into the treasury of the city of New York, it was held that the state was the creditor. In *re Chamberlin*, 17 N. B. R. 50; 9 Ben. 149; Fed. Cas. 2,580.

102. A bankrupt employed convicts under contract with a state. *Held*, that the claim of the state under such contract was entitled to preference under Revised Statutes, section 5101. In *re Southwestern Car Co.*, 19 N. B. R. 404; 9 Biss. 76; Fed. Cas. 13,192.

103. The warden of a state prison deposited money, coming into his hands as warden, in a bank upon the order of the directors. The account was kept in the name of "H. N. Smith, warden." The bank was put into bankruptcy. The district court held the state could claim, and so have priority, but the circuit court reversed that decision, and held that the warden could prove his account as a general creditor. In *re Corn Exchange Bank*, 15 N. B. R. 431; 7 Biss. 400; 9 Chi. Leg. News, 254; 4 Law & Eq. Rep. 29; 15 Alb. Law J. 351; Fed. Cas. 3,242.

104. A claim proved by A. as the warden of the state prison for the purchase price of property belonging to the state is entitled to priority. In *re Miller et al.*, 17 N. B. R. 402; 26 Pittsb. Leg. J. 8; Fed. Cas. 9,554.

### (g) *United States.*

See UNITED STATES, 1, 2, 3.

105. In case of insolvency or bankruptcy of a debtor of the United States, they are entitled to priority of payment out of his effects (act of 1800). *United States v. Fisher*, 2 Cranch, 358. See *Harrison v. Sterry*, 5 Cranch, 289.

106. A claim of the United States government for a judgment recovered against a bankrupt for violation of the internal revenue laws is entitled to priority over the claims of other creditors in the distribution of the bankrupt's estate. In *re Rosey*, 8 N. B. R. 509; 6 Ben. 507; Fed. Cas. 12,066.

107. Where the United States has obtained judgment, with leave, it is entitled to priority upon the judgment, damages, costs

and interest, and no proof of the claim is necessary. In *re Bousfield & Poole Mfg. Co.*, 17 N. B. R. 153; Fed. Cas. 1,704.

108. If one becomes surety for another under the revenue laws of the United States and a default ensues, although without his participation or knowledge, his estate in bankruptcy is liable for the debt of his principal, and the United States will receive payment in preference to his own creditors. *Six Penny Savings Bank v. Estate of Stuyvesant Bank*, 10 N. B. R. 399; Fed. Cas. 12,919.

109. A claim of the United States against bankrupts to recover as a penalty the value of goods imported contrary to law is a provable debt. *Barnes, Ass. v. United States*, 12 N. B. R. 526; 21 Int. Rev. Rec. 212; 1 N. Y. Wkly. Dig. 177; Fed. Cas. 1,023.

110. F. purchased certain hogsheads of sugar, while in custody of the United States in bond, paying the full price as if the duty were paid, the seller engaging to pay the duty. This he did in part, when he became bankrupt. The purchaser proved his claim, and upon petition was subrogated to the priority of the United States. In *re Kirkland, Chase & Co.*, 14 N. B. R. 139; 2 Hughes, 208; Fed. Cas. 7,843.

## IX. PROVABLE.

See BANKS, 6.

(a) *Defined.*

111. Any debt which may be proved by complying with any of the provisions of the bankrupt act is a provable debt. *Rankin et al. v. Florida, etc. R. R. Co.*, 1 N. B. R. 196; 1 Amer. Law T. Rep. Bankr. 85; Fed. Cas. 11,567.

112. Debts are provable against a bankrupt estate as of the date of the commencement of the proceedings in bankruptcy, and mutual debts or mutual credits referred to in the Revised Statutes, section 5073, must be such as are in existence at the same date. *Boatman's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265.

113. It was the intention of congress in passing the act of 1867 to adopt the time of actual adjudication of bankruptcy as the time at which a debt must exist in order to be provable, in contradistinction to the time of the commencement of proceedings in bank-

ruptcy. In re Hennocksburg and Block, 7 N. B. R. 87; 6 Ben. 150; Fed. Cas. 6,367.

114. By the term "debts provable under this act" (1867), congress meant debts unconditionally provable, without any release or other preliminary action, either by the court or by the assignee, being necessary. In re Scrafford, 14 N. B. R. 184; 3 Cent. Law J. 252; Fed. Cas. 12,557.

(b) *In General.*

115. If a debt "might have been proved," whether actually proven or not, it is embraced within the category of debts from which a discharge is a release under the provisions of section 84 of the act of 1867, even if the creditor was not named in the schedule, and received no notice of the proceedings. In re Archenbrow, 11 N. B. R. 149; 7 Chi. Leg. News, 99; Fed. Cas. 504.

116. If a register determine the amount due on a claim without hearing the claimant or appointing a time for hearing, his determination is not conclusive, although the claimant and the assignee agreed that he should adjust it. Moran et al. v. Bogert, 14 N. B. R. 393.

117. Where an employee was in the habit of receiving and paying out money for his employer, the employee may set off such money as may be in his hands at the time of the bankruptcy of his employer, against his salary due, whether he was in the habit of paying his own salary or not. Ex parte Pollard, 17 N. B. R. 228; 2 Lowell, 411; Fed. Cas. 11,252.

118. An employee may prove his claim for damages for a breach of contract caused by the filing of a voluntary petition in bankruptcy by his employer. *Id.*

119. That debts are contingent, in case the contingency happens before the close of the bankruptcy, or that it is difficult to assess damages for a breach of a contract, are not valid objections to the proof of a claim. *Id.*

120. Unliquidated damages, growing out of any contract or promise, when assessed, are provable debts, and may be set up by way of defense to show that no debt is due the petitioner entitling it to have the defendant declared a bankrupt. In re Osage Valley &

S. Kan. R. R. Co., 9 N. B. R. 281; 1 Cent. Law J. 33; Fed. Cas. 10,592.

121. A claim continues to constitute a provable debt, if it originated in contract, even though induced by fraud and prosecuted in an action for damages, although the fraud may have to be proved to entitle the plaintiff to recover. In re Schwarz, 15 N. B. R. 330; 14 Blatchf. 196; 52 How. Pr. 513; 15 Alb. Law J. 850; Fed. Cas. 12,502.

122. A debtor, afterwards declared bankrupt, employed counsel to prosecute a claim, the attorneys to receive one-half the amount recovered. The assignee of the bankrupt employed other counsel, who procured the substitution of his name as plaintiff under a similar agreement as to fees. The debtor was discharged before judgment was obtained. *Held*, that his counsel were entitled to one-half the recovery. Maybin v. Raymond, Ass., 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,338.

123. By an agreement between a creditor and his solicitor the latter was to recover from the bankrupt the amount of the debt or settle with him, all proceedings to be at the cost of the solicitor, who was to retain three-fourths of any sum collected. *Held*, that the claims being valid in their inception, the champertous agreement did not prevent the creditor from proving the debt. In re Lathrop et al., 3 N. B. R. 105; 3 Ben. 490; Fed. Cas. 8,103.

124. On a motion to expunge the proof of a debt against which the statute of limitation had run, *held* that, the debt having been included in the debtor's schedules, it was provable. In re Hertzog, 18 N. B. R. 526; Fed. Cas. 6,433.

125. A. transferred to B, who knew of A's insolvency, property in payment of a pre-existing debt. A. at the time had no title to the property so transferred, but B. was ignorant of this fact. *Held*, that B. was not precluded from proving his claim in full, not having received a preference. In re Bousfield & Poole Mfg. Co., 16 N. B. R. 439; Fed. Cas. 1,703.

126. A defendant sold the plaintiff certain land, gave a warranty deed, and agreed in writing to pay a mortgage on the land. The defendant was discharged in bankruptcy, after which the land was sold under

the mortgage. On a suit on the warranty, *held*, that the plaintiff's debt was one provable in bankruptcy, and from which the defendant was discharged. *Parker v. Bradford*, 17 N. B. R. 485.

127. The court will allow a claim of a church corporation, founded upon a verbal promise by the bankrupt to M. that he would pay a certain sum if M. would subscribe a portion of the indebtedness due from the church to M., the promise being subsequently publicly announced by the bankrupt in the church, it appearing that the church trustees had incurred expenses upon the faith of the subscriptions generally. *Capelle, Ass., v. The Trinity M. E. Church of Chester*, 11 N. B. R. 536; Fed. Cas. 2,392.

128. After a petition in bankruptcy had been filed, a relative of one of the debtors endeavored to buy up all the debts to settle the case out of court. Failing to do this, the claims were offered by him for proof. These debts were admitted. *In re Pease*, 6 N. B. R. 173; Fed. Cas. 10,880.

129. Where premises under a lease are condemned to the use of a railroad company, and damages are paid by the company to the tenant upon the basis that his obligation to pay rent during the remainder of the term will continue, which he expressly recognizes and which he partly performs, the landlord, on the bankruptcy of the tenant, will be allowed to prove against the estate the amount of the unpaid instalments of rent, at their value at the time of the bankruptcy. *In re Clancy*, 10 N. B. R. 215; Fed. Cas. 2,782.

130. A bankrupt brought an action against a debtor, and a counter-claim was pleaded. The plaintiff was adjudicated bankrupt before the trial, the defendant offered no evidence, and the plaintiff obtained judgment. *Held*, that the defendant was entitled to prove his claim in bankruptcy. *In re Safe Deposit and Savings Inst.*, 18 N. B. R. 493.

131. Under valid attachments creditors took the real estate of the bankrupts. The tax collector made proof for taxes assessed prior to proceedings in bankruptcy. *Held*, it would be inequitable to allow the creditors to escape taxes if they were at the time of the levy allowed and deducted from the valuation by the appraisers. *Foster et al.*,

*Ass., v. Inglee, Collector of Taxes*, 13 N. B. R. 289; Fed. Cas. 4,978.

132. An action to recover a provable debt will be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or not. *In re Rosenberg*, 2 N. B. R. 81; 8 Ben. 14; 1 Chi. Leg. News, 108; Fed. Cas. 12,054.

### (c) *Against or by Partnership.*

See PARTNERS, 14, 42, 103, 128, 139-152, 161, 176, 182-190.

133. Debts due by a firm are so far the debts of each member that any creditor of the firm may prove the debts due him from the copartnership as against any member of the firm; and whether he petition as an individual or as a member of a firm, or of a late firm, the petitioner is liable both as an individual and as a copartner, and is jointly as well as severally liable upon a contract, whether made as an individual or as a member of the firm. *In re Frear*, 1 N. B. R. 201; 2 Ben. 467; 85 How. Pr. 249; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 5,074.

134. A firm creditor, having also the individual liability of one of the firm in respect to the same debt, may prove it against either the individual or the firm. *In re Long*, 9 N. B. R. 227; 7 Ben. 141; Fed. Cas. 8,476.

135. A partnership creditor has such an interest in the separate property of any one of the partners that he may proceed against the estate of one alone upon the proof of his death. *In re Melick*, 4 N. B. R. 26; Fed. Cas. 9,399.

136. Where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share, *pari passu*, in the estate of the bankrupt partner. *In re Downing*, 3 N. B. R. 182; 1 Dill. 33; 17 Pittsb. Leg. J. 169; 3 Amer. Law T. 165; 2 Chi. Leg. News, 265; 1 Amer. Law T. Rep. Bankr. 207; Fed. Cas. 4,044.

137. A creditor who has a claim against a firm, and has proved it against the estate of two members of the firm who took the assets and assumed the debts of the firm, may prove for any balance due him against the third member of the firm, who subsequently becomes bankrupt. *In re Pease*, 13 N. B. R. 168; Fed. Cas. 10,881.

138. Where a party files separate proofs

of debt for the same amount against the individual members of the firm, the claims must stand as proven, and the motion of the assignee that they be stricken out will be overruled. In re Beers et al., 5 N. B. R. 211; Fed. Cas. 1,329.

139. A creditor holding the note of a copartnership, indorsed by one of its members, may prove in bankruptcy against the copartnership fund, and also against the separate estate of the indorsing copartner, and he may elect out of which fund he may be paid. *Arguendo*: He may collect dividends from both funds. Stephenson v. Jackson, 9 N. B. R. 255; 2 Hughes, 204; Fed. Cas. 13,374.

140. Notes may be proved by the holders against the bankrupt estate of the firm, where drawn by one partner in the firm name, apparently in the course of partnership business, without *mala fide* or actual knowledge by the holder of want of authority or intended misapplication. Bush v. Crawford, 7 N. B. R. 299.

141. A creditor holding the note of a copartnership of three members, indorsed by one for part of his debt, and also three notes, each made by a copartner and indorsed by the others, and proving against the makers of the notes only, is entitled to dividends out of the several estates, joint or separate, against which proofs were made. Mead v. National Bank of Fayetteville, 2 N. B. R. 173 (8 vo. ed.); 6 Blatchf. 180; 7 Amer. Law Reg. (N. S.) 818; Fed. Cas. 9,386.

142. If a creditor had recourse to the estate of a deceased partner, he is not precluded from an equal participation in the funds of an assignee of one who was a partner and indebted to the deceased, and who afterward became bankrupt. In re Mills, 11 N. B. R. 74; Fed. Cas. 9,611.

143. A firm note issued to a partner for his share in the capital stock, and by him transferred to his wife, by whom such capital was advanced, may be proven against the individual estate of such partner, but not against the partnership. In re Frost & Westfall, 3 N. B. R. 180; Fed. Cas. 5,185.

144. Where an agent of a company converted to the use of a bankrupt firm of which he was a member acceptances held by the company, and indorsed them to his firm, who indorsed them to S., *held*, that S. could prove against the estate of the bank-

rupts the entire demand; that the company could prove its demand for money had and received; and if S. recovered the whole amount from the maker or acceptor, it would stand as trustee for the estate for the dividend paid. In re Morse & Co., 11 N. B. R. 482; Fed. Cas. 9,853.

145. An executor invested funds of the estate in his partnership business with the assent of his copartner, and on objection by the bankrupt partnership's assignee to the proof by the beneficiaries, entitled to such fund, of their debts against the partnership, they having already proved against the executor's estate, *held*, that such proof was proper. In re Tesson et al., 9 N. B. R. 378; Fed. Cas. 13,844.

146. B., on dissolution of the partnership, bought A.'s interest, agreeing in writing to pay the firm's debts, and added to the stock of goods until he was adjudged a bankrupt. On objection by the individual creditors to the firm creditors sharing with them, *held*, that the joint creditors of A. and B. must share *pro rata* with the individual creditors of B. in the distribution of the bankrupt's estate, and that the firm creditors can participate in a dividend without showing that they have exhausted the retiring partner's individual estate. In re Rice, 9 N. B. R. 373; 21 Pittsb. Leg. J. 159; Fed. Cas. 11,750.

147. Firm creditors must be postponed to separate creditors, when partners filed separate petitions, whether there are joint assets or not. In re Morse, 13 N. B. R. 376; Fed. Cas. 9,854.

148. Where claims are purchased on behalf of bankrupt copartners, the amounts must be refunded to purchasers of the claims as an equitable claim against the estate in the hands of the assignees. In re Lathrop et al., 5 N. B. R. 43; 5 Ben. 199; Fed. Cas. 8,104.

149. A. and B. were, at the time of their bankruptcy, indebted to the firm of C. & B. B. offered to prove the debt of the firm of C. & B. as the remaining or surviving partner having a right to wind up its affairs. *Held*, that the debt should be admitted to proof. In re Buckhouse & Gough, 10 N. B. R. 206; 2 Lowell, 331; Fed. Cas. 2,086.

150. B. B. & K., composing the firm of E. & D. B. & Co., executed as such a bond binding themselves jointly and severally. *Held*, that the bond may be proven against

and paid from the dividends out of the several estates of the individual members of the firm. In *re Bigelow et al.*, 2 N. B. R. 121; 3 Ben. 146; 2 Amer. Law T. Rep. Bankr. 41; Fed. Cas. 1,897.

(d) *Based on Commercial Paper.*

See COMMERCIAL PAPER, 12-20, 40.

151. The holder of an accommodation note is entitled to prove it in full against the party for whose accommodation it was given, notwithstanding he has received a part of it from the maker. *Ex parte Harris et al.*, 18 N. B. R. 432; 2 Lowell, 568; Fed. Cas. 6,109.

152. The holder of a promissory note may prove his claim against the estates of both the maker and the indorser and receive dividends to the full amount of his debt. *National Mount Wollaston Bank v. Porter et al.*, 17 N. B. R. 329.

153. The holder of a negotiable note assigned for value after the filing of the petition may prove the debt against the bankrupt maker, or oppose his final discharge. In *re Murdock*, 3 N. B. R. 86; 1 Lowell, 362; Fed. Cas. 9,939.

154. An indorser or drawer may prove on the note or bill if he has taken it up at any time before the final dividend, and, being provable, the debt will be discharged. *Ex parte Talcott*, 9 N. B. R. 502; 2 Lowell, 320; Fed. Cas. 13,184.

155. Proof of a note payable "in current money of the state" in which it is made is, if not otherwise open to objection, allowable. In *re Whittaker*, 4 N. B. R. 41; Fed. Cas. 17,598.

156. Where the holder of a note receives part of the amount due from the indorser, he may prove the whole amount against the estate of the bankrupt maker, and hold the surplus in trust for the indorser. If the creditor omit to prove the debt, the indorser may prove the amount against the bankrupt's estate and receive dividends upon the whole amount. In *re Ellerhorst & Co.*, 5 N. B. R. 144; 6 Amer. Law Rev. 162; Fed. Cas. 4,381.

157. Where a party, intending to take the property of a corporation and assume its debts, buys one of its notes which is indorsed by the bankrupt, *held*, that the indorser (bankrupt) is not released. *Ex parte Balch*, 13 N. B. R. 160; 2 Lowell, 440; Fed. Cas. 780.

158. G. obtained judgment on notes against K. Bros., and S. K. Bros. were subsequently adjudged bankrupts and G. proved against their estate. *Held*, that the debt could be proved against the estate of the principal debtors, notwithstanding a joint judgment had been recovered therefor against the principal debtors and surety. In *re Kitzinger et al.*, 19 N. B. R. 152; Fed. Cas. 7,861.

159. An appeal was taken from the district court in bankruptcy, disallowing a claim based upon promissory notes given in renewal of previous notes, and upon a deed of trust given in renewal of a former deed of trust. The claim was filed by the executors of the creditor. Motion was made to dismiss the appeal on the ground that it was not filed within ten days after the decree. The motion was denied, and upon the merits of the case the judgment below was reversed. *Barron et al. v. Morris, Ass.*, 14 N. B. R. 371; Fed. Cas. 1,055.

160. A. after January, 1869, paid a judgment rendered against him as surety of B. on a note given prior to 1869, and on proof of his debt against the estate of B. in bankruptcy, *held*, that within the meaning of section 83 of the act of 1867, A.'s debt was "contracted" after January 1, 1869. In *re Parrish*, 9 N. B. R. 573; Fed. Cas. 10,769.

161. A bankrupt, intending bankruptcy, made an agreement with his attorneys, by which he was to pay them \$500 for their services in the adjudication, and gave his note for the amount, to secure which he executed a mortgage of nearly all his property, real and personal. *Held*, that the mortgage was void, but the attorneys were allowed to prove their claim. In *re Evans*, 3 N. B. R. 62; Fed. Cas. 4,552.

162. A university undertook to raise an endowment fund, and the bankrupt subscribed and afterward gave his notes for his subscriptions. The assignee in bankruptcy asked that the amount due on the subscriptions be set aside. *Held*, that the claim was valid. *Sturgis, Ass. v. Colby et al.*, 18 N. B. R. 168; Fed. Cas. 13,574.

163. Nearly a year before the petition was filed a bankrupt placed for collection a note signed by a third person, upon which a judgment was recovered about the time the bankruptcy took place. In the meantime

the bankrupt drew orders upon the collector, requesting him to pay sums to the several payees out of the proceeds of the note. *Held*, that the holders of such orders were entitled to be paid in preference to the assignee. In *re Smith*, 16 N. B. R. 399; 10 Chi. Leg. News, 86; 5 N. Y. Wkly. Dig. 322; Fed. Cas. 12,992.

(e) *By Wife.*

See MARRIED WOMAN, 12.

164. The bankrupt's wife may prove as a creditor against his estate in bankruptcy for money realized by him out of property which she held as her separate estate under the statutes of Massachusetts, if the evidence clearly show that the transaction was intended to be a loan and not a gift. In *re Blandin*, 5 N. B. R. 89; 1 Lgwell, 548; Fed. Cas. 1,527.

165. A wife who deposits money with her husband and receives portions thereof from time to time, leaving a balance at the time of her husband's bankruptcy, is entitled to prove in bankruptcy proceedings as a general creditor; and her debt may not be offset by the value of reasonable gifts from the husband, or of an insurance policy on his life for the benefit of the wife and children. In *re Bigelow et al.*, 2 N. B. R. 170; 8 Ben. 198; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 1,398.

166. A bankrupt may testify to support a claim of his wife against the estate, where such testimony would be competent under the state laws in force prior to December 1, 1873. In *re Bean*, 14 N. B. R. 182; 2 Wkly. Notes Cas. 432; Fed. Cas. 1,166.

(f) *Costs.*

See COSTS AND FEES, 16, 82, 69.

167. A debt or principal must be proved or allowed before the costs made prior to the commencement of proceeding in bankruptcy can be proved and allowed. The original debt having been allowed, attachment costs may be proved if made before commencement of proceedings in bankruptcy without knowledge of the insolvency. In *re Preston*, 5 N. B. R. 293; Fed. Cas. 11,393.

168. A bankrupt's property was attached within four months prior to bankruptcy. The sheriff turned the property over to the marshal with the understanding that what-

ever the sheriff's rights were as to costs should be preserved. Evidence showed that the sheriff had preserved the goods. *Held*, that his claim was provable on the ground of having preserved the goods. In *re Jenks*, 15 N. B. R. 301; Fed. Cas. 7,276.

(g) *For Insurance.*

169. A fire insurance company became bankrupt. Before the final dividend a loss occurred upon a policy issued by said company. *Held*, the loss was a provable debt. *American Plate Glass & Fire Ins. Co.*, 12 N. B. R. 56; Fed. Cas. 814.

170. One owning a debt secured by an insurance policy on the life of the bankrupt is entitled to prove the amount of the debt less the surrender value of the policy. In *re Newland*, 7 N. B. R. 477; 6 Ben. 842; Fed. Cas. 10,170.

171. Where a party insured presents notice of his loss, together with proof, or what purports to be proof, and evidence of the extent of the loss sustained, and no objections are taken thereto, objections are held to be waived. In *re Republic Ins. Co.*, 8 N. B. R. 197; 8 Ins. Law J. 390; 5 Chi. Leg. News, 385; Fed. Cas. 11,705.

172. An insurance company which re-insures its policies in another company is entitled, upon the bankruptcy of the latter, to prove the policies re-insured in full without reference to the amount it paid the holders. *Id.*

(h) *For Interest.*

See INTEREST, 5, 8, 13.

173. Interest is allowable which has accrued after the commencement of bankruptcy proceedings. In *re Bousfield & Poole Mfg. Co.*, 17 N. B. R. 153; Fed. Cas. 1,704.

174. There is nothing in the bankruptcy law to prohibit the payment of interest on claims proven against the bankrupt's estate from the day of filing the petition, when there are sufficient funds in the hands of the assignee to do so. In *re Hagan*, 10 N. B. R. 383; Fed. Cas. 5,898.

175. Where a note has been given, and, to secure the payment of excessive interest, another note is given for the total interest for the entire period of the main note, and bankruptcy of the maker ensues before the main note is due, there can, upon the note

for interest, be allowed only such proportion as may have fallen due prior to adjudication in bankruptcy. In *re Riggs et al.*, 8 N. B. R. 90.

176. An adjudication in involuntary bankruptcy was based upon a claim, the principal of which was less than \$250, but the added interest made the sum surpass that amount. *Held*, that the interest should be included in the claim. *Sloan v. Lewis*, 12 N. B. R. 173; 23 Wall. 150.

177. A register made his report February 15, 1877. He allowed interest on claims to September 15, 1876. *Held*, that interest should have been allowed to the date of the report. In *re Devore*, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

178. The reservation of a greater rate of interest than six per centum by a national bank, for discounting a promissory note, does not render the debt for the principal thereof one not provable in bankruptcy. In *re Moore*, 1 N. B. R. 123; 2 Bond, 170; Fed. Cas. 10,041.

### (i) *For Judgment.*

See JUDGMENT, 16, 41, 66, 80.

179. It is optional with the judgment creditor of a bankrupt whether he will prove his debt in bankruptcy or rely on his judgment lien. *Heard v. Jones*, 15 N. B. R. 402.

180. Where a judgment is recovered after commencement of proceedings in bankruptcy, upon a debt which existed before that time, the debt is not so merged in the judgment as to deprive the creditor of the right to prove it. In *re Brown*, 3 N. B. R. 145; 5 Ben. 1; Fed. Cas. 1,975.

181. Where an action before a justice of the peace is commenced prior to the filing of the debtor's petition, and a judgment is recovered after adjudication, the debt is not so merged in the judgment as to prevent its proof. In *re Vickery*, 3 N. B. R. 171; Fed. Cas. 16,930.

182. It is not necessary for creditors who have recovered judgments, after the adjudication of their debtor, to vacate their judgments before they prove the claims on which such judgments were recovered, provided the claims are otherwise valid and provable. In *re Stevens*, 4 N. B. R. 122; 4 Ben. 513; Fed. Cas. 18,391.

183. A judgment recovered after adjudi-

cation, in a suit to which the assignee was not made a party, may be proved against the estate of a bankrupt, if the debt were a claim provable at the time of the adjudication. In *re Rosey*, 8 N. B. R. 509; 6 Ben. 507; Fed. Cas. 12,066.

184. A brought against B. an action *in tort* for personal injuries. Before the final judgment a petition in bankruptcy was filed against B. The judgment was perfected before adjudication. *Held*, that the judgment, if entered before adjudication, may be proved. In *re Hennocksburg and Block*, 7 N. B. R. 37; 6 Ben. 150; Fed. Cas. 6,367.

185. A judgment recovered in an action in *assumpsit* commenced prior to and prosecuted during proceedings in bankruptcy is a provable debt. In *re Stansfield*, 16 N. B. R. 268; 4 Sawy. 334; Fed. Cas. 13,294.

186. A ward recovered a judgment against her bankrupt guardian and sought to have it allowed and paid out of the bankrupt estate. The judgment was recovered after institution of proceedings in bankruptcy. *Held*, that the claim could not be proved without leave of the bankrupt court. In *re Maybin*, 15 N. B. R. 468; Fed. Cas. 9,387.

187. A judgment creditor may enforce his claim against property sold by the bankrupt before the commencement of the proceedings in bankruptcy, although his attorney was allowed a compensation for bringing the assets in the bankruptcy court. *Phillips v. Bowdoin*, 14 N. B. R. 43.

188. A judgment recovered against a bankrupt after filing of the petition but before adjudication, in an action commenced prior to the proceedings in bankruptcy, may be proved; but the costs which accrued subsequent to filing the petition do not constitute a claim or debt existing at that time, and should be excluded. In *re Crawford*, 3 N. B. R. 171; 3 Amer. Law T. 169; 1 Amer. Law T. Rep. Bankr. 210; Fed. Cas. 3,363.

189. A judgment creditor is not entitled to be paid in full out of the proceeds of a promissory note due the bankrupt and collected by the assignee, but may only share *pro rata* with the other creditors. In *re Erwin & Hardee*, 8 N. B. R. 142; Fed. Cas. 4,524.

190. A judgment from which an appeal is taken on writ of error before commencement of proceedings in bankruptcy is a provable debt; but no dividends will be paid to the



judgment creditor until judgment on the writ of error. In re Sheehan, 8 N. B. R. 345; Fed. Cas. 12,787.

191. Money became due certain parties under contract with bankrupts who failed to keep their obligation to pay, and when sued for an accounting reduced the amount of the judgment by fraud and perjury. Afterwards, but long prior to bankruptcy proceedings, the creditors obtained judgment against bankrupts for fraud, conspiracy and deceit. *Held*, that the debt was provable, and that the bankrupts were entitled to stay of proceedings including execution against the person. In re Van Buren, 19 N. B. R. 140; Fed. Cas. 16,838.

192. The proper remedy for a creditor who seeks to have a judgment against a bankrupt paid by the assignee is by petition, signed and verified, and not by motion. In re Smith, 2 N. B. R. 98; 1 Chi. Leg. News, 123; Fed. Cas. 12,964.

(j) *For Reduced Amount—Commercial Paper.*

193. A creditor held notes indorsed by the bankrupt, upon which payments were made by the makers after the creditors had proved the notes against the estate of the bankrupt. *Held*, that such payments must be deducted from the sum on which a dividend could be demanded. In re Weeks, 18 N. B. R. 263; 8 Ben. 265; Fed. Cas. 17,849.

194. After the holder of a certain note signed by the bankrupt had made proof in full against the estate, an indorser secured by the bankrupt paid the full amount to the holder and disposed of the security. *Held*, that he should give credit for the amount realized from his security and take a dividend upon the excess only of the original debt as proved. In re Baldwin, 19 N. B. R. 52; 8 Cent. Law J. 186; Fed. Cas. 796.

195. Before proving against the estate of an indorser, a claimant received a dividend from the estate of the maker of the notes. *Held*, that he could prove only for balance. In re Hicks et al., 19 N. B. R. 299; Fed. Cas. 6,456.

196. A bankrupt executed a note payable to C., who indorsed and held it. T. purchased it before maturity and without notice of equities, for less than face. All parties were

citizens and residents of New York. T. obtained judgment for the face of the note, which was reversed on appeal and new trial granted unless T. should consent to reduction of judgment to amount paid by him. This was done; and on proof of claim, *held*, that the judgment of the appellate court was not conclusive, and that claimant was only entitled to prove for the amount paid by him with interest. In re Shelbourne, 19 N. B. R. 359; Fed. Cas. 12,745.

197. Bankrupts were factors. They gave notes to the company as advances, and indorsed other notes for the company, all of which the holder bought at a discount. On a motion to expunge the claims, *held*, that it was not shown clearly that the notes were accommodation paper, and therefore they should be proved; but those indorsed by the bankrupts should be proved only for the amounts the holders actually paid for them with lawful interest. In re Many et al., 17 N. B. R. 514; Fed. Cas. 9,054.

198. Pledges of promissory notes void between the original parties thereto which have been pledged as collateral security for the payment of an indebtedness are entitled to prove so much of the notes as will secure dividends to the full amount of their claim. Bailey, Ass., v. Nicholas et al., 2 N. B. R. 151; 2 Amer. Law T. Rep. Bankr. 60; 1 Chi. Leg. News, 185; Fed. Cas. 741.

(k) *For Reduced Amount—In General.*

199. The provision which prevents a creditor, in case of actual fraud, from proving more than a moiety of his debt, applies only where there has been a recovery. In re Riorden, 14 N. B. R. 332; Fed. Cas. 11,852.

200. Where money is advanced to a lumberman, to secure which lumbering permits are assigned, some advances being made before and some after commencement of proceedings in bankruptcy, the creditor is entitled to receive out of the proceeds of logs, sold by the assignee, only the amounts advanced prior to filing the petition. In re Gregg, 8 N. B. R. 131; 1 Hask. 173; 1 Amer. Law T. Rep. Bankr. 298; Fed. Cas. 5,796.

201. Goods of a bankrupt merchant were left in the store rented by the bankrupt some months before the assignee took possession.

The assignee immediately removed them. *Held*, that the owner of the store could claim a reasonable price for storage, but not the value of the store as a salesroom. In re Lucius Hart Mfg. Co., 17 N. B. R. 459; Fed. Cas. 8,592.

### (1) *For Value of Goods.*

202. A claim for the purchase price of goods left in a vendor's warehouse, marked with the vendee's mark and there destroyed by fire, may be proved in bankruptcy. Ex parte Safford et al., 15 N. B. R. 564; 2 Lowell, 563; 15 Alb. Law J. 328; 24 Pittsb. Leg. J. 159; Fed. Cas. 12,212.

203. A bailor who allows the bailee to mix the property bailed with the bailee's property, so that the identical property of each cannot be distinguished, may, upon the bankruptcy of the bailee, prove only as a general creditor and share *pro rata* in the assets. Adams v. Meyers, 8 N. B. R. 214; 1 Sawy. 306; Fed. Cas. 62.

204. A person, after becoming bankrupt, in order to secure goods upon credit, procured a guaranty to the amount of \$2,000, whereupon goods to the amount of \$3,000 were furnished. In the bankruptcy proceedings, the creditor sought to prove the whole claim as if unsecured. *Held*, that the whole claim might be proved as if unsecured. In re Anderson, 12 N. B. R. 502; 7 Biss. 233; Fed. Cas. 350.

205. An admitted right to recover from bankrupts, in an action at law, the value of goods, which is offered to be proved by witnesses, constitutes a debt against the bankrupts. Whether the debt arises from a promise to pay or from a duty or obligation is not important. Barnes, Ass., v. United States, 12 N. B. R. 526; 21 Int. Rev. Rec. 212; 1 N. Y. Wkly. Dig. 177; Fed. Cas. 1,023.

206. A. in good faith took a mortgage on goods sold to B. to secure the purchase-money. B. was to sell at retail and apply the proceeds on the mortgage. B. sold part of the goods, but failed to account to A.; and on B.'s going into voluntary bankruptcy, *held*, that the proceeds of the goods remaining unsold should go to A., and that he should be allowed to prove against B.'s estate as an unsecured creditor for the amount of the goods sold and misappropriated, on A.'s sur-

rendering the mortgage. Overman, Ass. etc., v. Quick, Adm'r, etc., 17 N. B. R. 235; 8 Biss. 134; 10 Chi. Leg. News, 210; Fed. Cas. 10,624.

207. A provision in a state law debarring a creditor from maintaining a suit for spirituous liquors purchased without the state, with intent to sell the same in violation of the law prohibiting such sale, does not deprive a creditor of his right to prove his claim in bankruptcy, if the sale were valid where made. In re Murray, 3 N. B. R. 188; 1 Hask. 267; Fed. Cas. 9,954.

208. A creditor's claim was for spirituous liquors sold to the bankrupt, part of which was sold and delivered in original packages. *Held*, that the claim for the amount so sold should be allowed. In re Town et al., 8 N. B. R. 38; Fed. Cas. 14,111.

## X. NOT PROVABLE.

### (a) *In General.*

209. No claims can be deemed provable that were not liquidated and fixed at the time of the adjudication of bankruptcy, if there be no evidence showing when the final dividend was made. United States v. Rob Roy and Cargo, 13 N. B. R. 235; 1 Woods, 43; Fed. Cas. 16,179.

210. A party advancing money to a debtor for the purpose of aiding him in committing an act of bankruptcy will not be permitted to prove a claim for the money so advanced as a debt against the bankrupt. In re Hatje, 12 N. B. R. 548; 6 Biss. 436; Fed. Cas. 6,215.

211. A creditor who obtains a preference within four months, having reasonable cause to believe at the time that a fraud was intended and that the debtor was insolvent, loses both his preference and his chance to prove his debt in bankruptcy. Bingham v. Richmond & Gills, 6 N. B. R. 127; Fed. Cas. 1,415.

212. When the sale of a claim is void for want of consideration or for fraud it goes back to the assignor, and is to be reckoned in the count as belonging to the assignor. In re Woodford & Chamberlain, 13 N. B. R. 575; Fed. Cas. 17,972.

213. Where a debtor receives a voluntary contribution, such receipt does not create a debt due by him. In re Oregon Bul. Pr. &

Pub. Co., 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

214. Interest on a debt will not be allowed for the period during which intercourse between the parties, and between the parts of the country in which they respectively lived, was suspended by the civil war. *Bigler v. Waller*, 4 N. B. R. 86; *Chase*, 316; 3 Chi. Leg. News, 26; 5 Amer. Law Rev. 570; Fed. Cas. 1,404.

215. A note was given for an insurance premium, containing the provision that if the note were not paid the policy should become void while it remained unpaid. After the note became due the insured vessel stranded, whereupon the note was paid, and the next day a gale destroyed the vessel. The amount of the premium was claimed against the estate of the bankrupt insurance company, but was disallowed. *Cardwell v. Republican Fire Ins. Co.*, 12 N. B. R. 253; 7 Chi. Leg. News, 232; Fed. Cas. 2,396.

216. A broker is bound to take notice of a buyer's bankruptcy, and when he holds stock for an unreasonable time after the bankruptcy and sells without notice, he must bear the loss. *In re Daniels*, 13 N. B. R. 46; 6 Biss. 405; 1 N. Y. Wkly. Dig. 271; 8 Chi. Leg. News, 17; Fed. Cas. 3,566.

217. A creditor claimed for expenses in proceedings which, if they had not been interrupted by proceedings in bankruptcy, would have resulted in payment in full of his debt at the expense of the other creditors. *Held*, that the claim should be rejected. *In re Archibrown*, 8 N. B. R. 429; Fed. Cas. 503.

218. One who purchases claims against a debtor in the debtor's interest cannot prove the claims so purchased in proceedings in bankruptcy. *In re Lathrop et al.*, 8 N. B. R. 105; 8 Ben. 490; Fed. Cas. 8,103.

219. A creditor held a mortgage for \$8,000 given by a bankrupt and S. M. upon land owned by them in equal shares. After the adjudication and appointment of the assignee, the creditor sold the mortgaged premises at auction for \$1,000, without notice to the assignee or leave of court, and claimed to prove for the balance of the debt. *Held*, that the creditor could not prove for any sum whatever. *In re Miller*, 10 N. B. R. 78; 19 Alb. Law J. 40; 26 Pittsb. Leg. J. 175; Fed. Cas. 9,555.

220. Creditors who have proved their debts cannot have the bankrupt's discharge set aside after his death that they may prove their demands against the estate of the debtor in the hands of his administrator. *Young et al. v. Ridenbaugh's Adm'r*, 11 N. B. R. 563; 8 Dill. 239; 7 Chi. Leg. News, 242; Fed. Cas. 18,173.

221. A claim for rent which accrued after the filing of the petition in bankruptcy, under a lease executed prior to such filing, is not provable under section 19 of the act of 1867. *In re May & Merwin*, 9 N. B. R. 419; 7 Ben. 238; Fed. Cas. 9,325.

222. The assignees in bankruptcy brought suit for certain goods and recovered judgment; the defendant appealed. The bankrupt had employed the defendant as selling agent and had given him a bill of sale for the goods for \$600. The defendant, after the principal became bankrupt, proved a claim against him for \$5,000, crediting him with \$500 for the goods described in the bill of sale. The claim was expunged, as the defendant had represented himself as owning the goods by virtue of the bill of sale, he himself claiming the bill of sale to be security for money loaned. The judgment below was affirmed. *Willis v. Carpenter et al.*, 14 N. B. R. 521; Fed. Cas. 17,770.

223. The state proved a debt against bankrupt for fines imposed on him as a punishment prescribed by law for the commission of a crime of which he had been duly convicted. *Held*, not a provable debt. *In re Sutherland*, 8 N. B. R. 83; *Deady*, 416; 8 Amer. Law Reg. (N. S.) 38; Fed. Cas. 13,630.

224. A right of action for misrepresentation of a firm's condition, afterwards bankrupt, is not provable as a debt. *In re Schuchardt & Wells*, 15 N. B. R. 161; 8 Ben. 585; Fed. Cas. 12,483.

225. A depositor delivered to the bank his check for his full balance, accepting in part payment bonds issued by the state of North Carolina in aid of the rebellion. Upon the petition to expunge proof of debt by the assignee in bankruptcy of the bank, *held*, that such bonds, when accepted by a debtor in payment of his debt, and while of value as a medium in the money markets, constitute a valid medium for the payment of the debt. *Holleman v. Dewey, Ass.*, 7 N. B. R. 269; 2 Hughes, 341; Fed. Cas. 6,607.

(b) *Barred by Limitation.*

See LIMITATION, STATUTE OF, 25, 42.

226. The question was certified to the court whether a debt barred by the statute of limitations of Massachusetts, where the bankrupt had resided for the past ten years, but not barred by the statutes of Vermont, where the creditors resided and where both parties resided when the contract was made, was provable. *Held*, that it could not be proved if objected to by the bankrupt or any creditor. In *re* Kingsley, 1 N. B. R. 52; 1 Lowell, 216; 7 Amer. Law Reg. (N. S.) 423; 15 Pittsb. Leg. J. 235; Fed. Cas. 7,819.

227. The statute of limitations of the state which is the bankrupt's residence applies to proof of debts against his estate; after adjudication the statute continues to run, and no claim can be enforced unless an action could be maintained in the state courts. *Nicholas, Ass. v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

228. In a case in involuntary bankruptcy (act of 1867) the debtor sought to defeat the petition on the ground that one-fourth in number and one-third in amount of creditors holding provable claims had not joined, the claim of one of such creditors being barred by the statute of limitations. It was held that such claim was not provable. In *re* Noesen, 12 N. B. R. 422; 6 Biss. 443; 7 Chi. Leg. News, 419; 1 N. Y. Wkly. Dig. 125; 2 Cent. Law J. 570; Fed. Cas. 10,288.

229. The act of 1867 expressly allows the petitioners to object to all debts barred by the statute of limitations; yet such a claim, if proved and not objected to by the petitioner or a creditor, must be allowed by the court, and the assignee must receive it as a claim entitled to its share of the dividend. In *re* Frear, 1 N. B. R. 201; 2 Ben. 467; 35 How. Pr. 249; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 5,074.

230. Where a bankrupt set forth in his schedule a debt barred by the statute of limitations of the state in which both debtor and creditor resided, and wherein the debt had been contracted, *held*, the debt was provable in bankruptcy unless it be shown to be barred through the United States. In *re* Ray, 1 N. B. R. 203 (8 vo. ed.); 2 Ben. 53; Fed. Cas. 11,589.

231. A debt barred by the statute of lim-

itations of the state where the bankrupt resides cannot be proved against his estate by a creditor resident in another state, notwithstanding such demand is not barred by the statute of limitations in the state where the creditor resides. In *re* Harden, 1 N. B. R. 97; 1 Hask. 163; 15 Pittsb. Leg. J. 343; Fed. Cas. 6,048.

(c) *Based on Commercial Paper.*

See COMMERCIAL PAPER, 12, 17-20, 40.

232. A prior gift constitutes no legal consideration for a promissory note, and the claim of the holder to be a creditor may be defeated on that ground. In *re* Cornwall, 6 N. B. R. 805; 6 Amer. Law Rev. 365; 9 Blatchf. 114; Fed. Cas. 3,250.

233. If there were no legal liability on the part of a bankrupt to pay a claim, the notes given therefor are void for want of consideration. In *re* Young, 15 N. B. R. 205; 1 Tex. Law J. 7; Fed. Cas. 18,149.

234. One who, being liable as joint maker of a note, gives his individual note in payment of the joint note, it being accepted as such, discharges the old note, and it cannot be proved against the estate of the other joint maker. In *re* Morrill, 8 N. B. R. 117; 2 Sawy. 356; Fed. Cas. 9,321.

235. A holder of a note who has granted an extension of time to the maker cannot prove the note against the estate of a bankrupt indorser. In *re* Granger & Sabin, 8 N. B. R. 30; Fed. Cas. 5,684.

236. The holder of a bill of exchange cannot prove against the estate of the acceptor after payment has been made by the drawer of the bill. *Ex parte Talcott*, 9 N. B. R. 502; 2 Lowell, 320; Fed. Cas. 13,184.

237. An application was made to expunge the proof of debt of a corporation on notes discounted for the bankrupts in regular course of business, on the ground the notes were not valid, as the corporation was not authorized by law to employ its funds in discounting paper. *Held*, that the proof be expunged, and the claim rejected as presented, without prejudice to the right of the assignee in bankruptcy of the corporation to make proof of a claim for money loaned the bankrupts. In *re* Jaycox & Green, 7 N. B. R. 578; Fed. Cas. 7,241.

238. A note taken for money loaned by a

savings bank, prohibited by law from loaning money on personal security, is void and does not constitute a debt provable in bankruptcy. *Id.*

239. Where an indorser of a protested note has purchased the goods of a bankrupt he is excluded from proving his debt as a claim against his estate. *Cookinham et al. v. Morgan et al.*, 5 N. B. R. 16; 7 Blatchf. 480; Fed. Cas. 3,183.

240. Where a bankrupt received property as security for indorsements and notes made by him for the benefit of the owner of the property, *held*, that a holder of one of the notes was not entitled to a summary order directing payment of his claim out of the property. *Hurst v. Teft, Ass.*, 18 N. B. R. 108; 13 Blatchf. 217; Fed. Cas. 6,939.

241. A note payable on demand was not presented for payment for four years, when attempt was made to hold the indorser, who had become bankrupt. The claim was disallowed. *In re Crawford*, 5 N. B. R. 301; Fed. Cas. 3,364.

242. A note was indorsed and the maker delivered it for value to H. Upon failure of the maker to pay it was protested, the indorser being notified. The maker became bankrupt, and produced the written consent of sufficient creditors and was discharged. Among the signers was H., and after him the indorser, who himself became bankrupt. H. proved the claim against the estate, and objected to his discharge. The claim of H. was rejected by the register and by the court. *In re McDonald*, 14 N. B. R. 477; 24 Pittsb. Leg. J. 42; Fed. Cas. 8,753; R. S. 5118.

243. A banker became bankrupt. Just after filing the petition assignments were made by the holders of certificates of deposit issued by the banker to R., to be used as an offset by him in a pending suit. The assignments were security for an antecedent debt, and came into the hands of third persons. A restraining order being sought to prevent payment on a claim based on such certificates, it was held that they were not negotiable paper and that no payment should be made thereon. *In re Sime & Co.*, 12 N. B. R. 315; 3 Saw. 305; Fed. Cas. 12,861.

244. A creditor offered proof against the estate of a bankrupt, consisting of a note in which the initials only of the first names of the parties appeared. No evidence was offered as to the full Christian names of either

of the parties. The claim was refused. *In re Valentine*, 12 N. B. R. 889; 4 Biss. 317; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 16,812.

#### (d) *By or Against Partnership.*

See PARTNERS, 14, 42, 103, 128, 132-152, 161, 176, 182-190.

245. A claim of one firm of which the bankrupt is a partner against another firm of which he is a partner is not a debt provable against him. *In re Lloyd*, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429.

246. The members of the firm A., B. & C. were also members of the firm A., B., C. & D. The latter firm became bankrupt. *Held*, that the debts of the former firm could not be proven against the latter. *In re Savage*, 16 N. B. R. 368; Fed. Cas. 12,381.

247. The firm of A., B., C. & D. proved claims against a bankrupt. The firm B., C. & D. filed specifications in opposition to his discharge. *Held*, that B., C. & D. had no standing to oppose the discharge. *In re Palmer*, 8 N. B. R. 77; Fed. Cas. 10,682.

248. When the debt from one partner to the firm was incurred by the consent of the other partner, proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy. *In re Mo-Ewen & Sons*, 12 N. B. R. 11; 6 Biss. 294; 7 Chi. Leg. News, 231; 2 Cent. Law J. 233; Fed. Cas. 8,783.

249. A company's agent executed a note payable to a bankrupt firm of which he was a member. The firm indorsed the note to M., who discounted it and paid the proceeds to the bankrupts. M. paid the note, proved the amount against the bankrupt's estate, and obtained judgment against the company for the same amount. The company sought to prove the amount of the judgment in bankruptcy, although it had paid no part of it. *Held*, that the claim could not be twice proved; that M. would hold dividends received by him as so much paid on the note, and must give credit for so much on the judgment. *In re Morse & Co.*, 11 N. B. R. 482; Fed. Cas. 9,853.

250. Where an accommodation note is indorsed by one member of a partnership without the knowledge or consent of the other, it cannot be proved against the firm.

In re Irving & Irving, 17 N. B. R. 22; Fed. Cas. 7,074.

251. A note given in an individual transaction of one of the bankrupts, though signed in the firm name, is not provable in bankruptcy against the firm assets. In re Forsyth and Murtha, 7 N. B. R. 174; Fed. Cas. 4,948.

252. B. proved a judgment against the estate of a firm, and after a dividend proved against the separate estate of one member, alleging that the note on which it was based was executed by him and indorsed by the other member. A creditor of the separate estate asked to have the second proof expunged. *Held*, that it should be expunged. In re Herrick & Herrick, 18 N. B. R. 312; Fed. Cas. 6,420.

253. A firm became bankrupt. A creditor of a former firm not adjudged bankrupt, one of the members being a member also of the bankrupt firm, asked that, after the payment of the individual debts of the partner, the remaining assets should be merged with those of the bankrupt firm, and that the debts of such creditors should be paid therefrom. *Held*, the claim was not provable against the firm. In re Dunkerson & Co., 12 N. B. R. 391; 4 Biss. 323; 1 N. Y. Wkly. Dig. 179; Fed. Cas. 4,159.

254. Where a partner retires and agrees to pay all partnership debts, as between themselves the remaining partner is a surety for the retiring partner; but in case the surety has not actually paid any such debts, he cannot prove his claim against the estate of the retiring partner for the excess of such debts over the dividends to be paid. In re Phelps, 17 N. B. R. 144; 9 Ben. 286; Fed. Cas. 11,070.

#### (e) *By or Against Wife.*

See MARRIED WOMAN, 12.

255. A claim for alimony is not a provable debt, and proceedings to enforce its payment cannot be stayed by the bankrupt court. In re Lachemeyer, 18 N. B. R. 270; 18 Alb. Law T. 242; Fed. Cas. 7,966.

256. A wife allowed her husband to appropriate the *income* of her separate estate in the support of the family. *Held*, that it did not create such a debt on his part as is provable in bankruptcy against his estate. In re Jones, 9 N. B. R. 556; 6 Biss. 68; 6 Chi. Leg. News, 271; Fed. Cas. 7,444.

257. That a debt is contracted during

coverture by a *feme covert* who, though actually engaged in trade, has not complied with the requirements of the statutes, is available by her to defeat debts in bankruptcy. In re Slichter, 2 N. B. R. 107; Fed. Cas. 12,943.

#### (f) *For Judgment.*

See JUDGMENT, 16, 41, 66, 80.

258. A judgment rendered after adjudication in bankruptcy, although the debt upon which it was founded existed, and the suit thereon was instituted prior thereto, is not provable against the estate of a bankrupt, and no dividend can be declared thereon. In re Williams, 2 N. B. R. 79; 8 Amer. Law Rev. 374; 1 Amer. Law T. Rep. Bankr. 107, 118; Fed. Cas. 17,705; In re Gallison et al., 5 N. B. R. 353; 2 Lowell, 73; Fed. Cas. 5,203.

259. A confession of judgment and the execution of a chattel mortgage by an insolvent debtor for the benefit of a creditor who knows or has reasonable cause to believe that the debtor is insolvent is a fraudulent preference, and deprives such creditor of the right to prove his claim against the estate of the bankrupt notwithstanding he may disclaim any benefit to accrue from and surrenders such judgment and chattel mortgage. In re Colman, 2 N. B. R. 172; 7 Blatchf. 192; Fed. Cas. 2,979.

260. A judgment entered in an action for a personal tort after the commencement of proceedings in bankruptcy upon a verdict rendered before that time is not a provable debt. Leave to issue execution on the judgment will not be granted. *Black v. McClelland*, 12 N. B. R. 481; 7 Chi. Leg. News, 420; 1 N. Y. Wkly. Dig. 174; Fed. Cas. 1,462.

261. A mere verdict in an action for a personal tort is not a provable debt. *Id.*

262. A mortgage creditor with leave of the court foreclosed in a state court and proved his claim on the judgment for the deficiency. *Held*, that he had no right to prove such claim, the sale in the state court not being the proper measure for ascertaining the value of his security. In re Herreck et al., 17 N. B. R. 335; Fed. Cas. 6,421.

#### (g) *Illegal.*

263. The claim of a creditor who has illegally increased its amount, or of which a por-

tion of the consideration is good and a portion illegal, will be rejected altogether. In re Elder, 3 N. B. R. 165; 1 Sawy. 73; 17 Pittsb. Leg. J. 178; 3 Amer. Law T. Rep. 140; 2 Chi. Leg. News, 241; 1 Amer. Law T. Rep. Bankr. 198; Fed. Cas. 4,826.

264. A debt contracted by the loan of Confederate treasury notes to enable the borrower to hire a substitute for the Confederate army, who was actually hired and who served in said army, cannot be admitted to proof as a debt under the bankrupt act, such debt being illegal and void. In re Milner, 1 N. B. R. 19.

265. A debt incurred by the loan of Confederate treasury notes is not provable in bankruptcy. In re Milner, 1 N. B. R. 107.

266. Several debts of a bankrupt had been contracted either in whole or in part for liquors in violation of the state law. Upon petition of the assignee, *held*, that the names of the claimants must be stricken from the list of creditors. In re Paddock, 6 N. B. R. 132; Fed. Cas. 10,657.

267. Stock brokers proved claims, but the assignee moved to expunge, alleging that they were based on void contracts. The claims arose from contracts for speculation in wheat "margins," and the court held they were gaming contracts and that the brokers could not prove their claims for money advanced for such purposes. In re Green, 15 N. B. R. 198; 7 Biss. 338; Fed. Cas. 5,751.

268. A speculative option, where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences—commonly called a "put,"—is a wagering contract and void, either as within the statutes against gambling or as against public policy, and is not a provable debt in bankruptcy. In re Chandler, 9 N. B. R. 514; 13 Amer. Law Reg. (U. S.) 310; 6 Chi. Leg. News, 229; Fed. Cas. 2,590.

269. Upon consideration of a claim against a bankrupt's estate growing out of a slave contract, *held*, that the thirteenth amendment to the constitution repealed all laws sanctioning slavery, and as such contracts were against natural right and justice, they depended upon positive law for their validity. Therefore, a right of action did not survive the repeal of the laws. Buckner v. Street, 7 N. B. R. 235; 1 Dill. 248; 13 Int. Rev. Rec. 114; Fed. Cas. 2,098.

### (h) Usurious.

270. Notes given for the excess over legal interest are not provable in bankruptcy, and must be surrendered to the assignee. Shaffer v. Fritchery & Thomas, 4 N. B. R. 179; Fed. Cas. 12,697.

271. In Illinois, if a party who has taken usury seeks to enforce his claim by suit, he forfeits all interest. In re Prescott, 9 N. B. R. 885; 5 Biss. 523; 6 Chi. Leg. News, 151; Fed. Cas. 11,389.

272. Upon receiving the amount of a loan, the borrower gave his note for the amount with legal interest, and also \$20 for accommodation. The state statute provided that a usurious contract should work a forfeiture of the entire debt to the school fund. *Held*, that the debt was usurious. In re Pitcock, 8 N. B. R. 78; 2 Sawy. 416; Fed. Cas. 11,189.

273. An assignee, through the court, may require the creditor to prove his debt in the usual form, citing the security and setting forth the consideration, and may contest the claim for any usurious surplus. Bromley, Ass., v. Smith et al., 5 N. B. R. 152; 2 Biss. 511; 3 Chi. Leg. News, 297; Fed. Cas. 1,922.

### XI. SET-OFF.

See SET-OFF, 21, 22, 23.

274. A creditor of an insolvent may assign his claim, before the filing of the petition in bankruptcy, to a debtor of the insolvent, and such claim may be set off by the debtor after the proceedings in bankruptcy have been instigated. In re City Bank, etc., 6 N. B. R. 71; 4 Chi. Leg. News, 81; 6 West. Jur. 65; Fed. Cas. 2,742.

275. A debt of one insolvent purchased by his debtor immediately prior to the filing of a petition in bankruptcy, in order to set the same off against his indebtedness, is protected by the bankrupt act, it only forbidding the setting off of claims purchased after the petition is filed. Hovey et al. v. Home Ins. Co., 10 N. B. R. 224; 13 Amer. Law Reg. (N. S.) 511; 3 Ins. Law J. 815; Fed. Cas. 6,743.

276. A claim against the bankrupt before his bankruptcy cannot be set off against an indebtedness on goods purchased from the assignee, but a claim against the bankrupt's estate may be set off against an indebtedness for goods purchased from the assignee. Moran et al. v. Bogert, 14 N. B. R. 393.

277. A debt due to several joint creditors cannot be set off against a debt due by one of them. *Gray v. Rollo*, 9 N. B. R. 387; 18 Wall. 629.

278. A debtor of a bankrupt who accepts a transfer of his note, without stipulation as to the terms of the transfer, cannot set it off against his own debt. *Ex parte Dreyfus*, 13 N. B. R. 43; 2 Lowell, 305; 1 N. Y. Wkly. Dig. 296; Fed. Cas. 8,043.

## XII. TO BE INCLUDED IN PETITION.

See PETITION, 4, 11, 32, 33, 56, 67, 77, 98.

279. In counting the amount of claims of creditors all claims must be included, irrespective of amounts. In *re Woodford & Chamberlain*, 13 N. B. R. 575; Fed. Cas. 17,972.

280. Under the act of 1867, in reckoning the amount of debts necessary to be joined in an involuntary petition, debts for less than \$250 each are to be included. In *re Currier*, 13 N. B. R. 68; 2 Lowell, 436; Fed. Cas. 3,492.

281. Creditors filed a petition to have a debtor adjudged bankrupt, owing to suspension of payment on a promissory note held by them (act of 1867). Partial payments had been made reducing the amount of the indebtedness to \$240. The petition was dismissed for want of jurisdiction. In *re Skelley*, 5 N. B. R. 215; 3 Biss. 260; Fed. Cas. 12,921.

282. An original petition was dismissed with leave to amend. Before amendment one of the creditors assigned his claim. The remaining creditors did not represent the amount of debts required. *Held*, the amended petition should be dismissed, as it is in the discretion of the court to allow the assignment. In *re Western Savings & Trust Co.*, 17 N. B. R. 413; 4 Sawy. 190; Fed. Cas. 17,442.

## CLERKS.

See COSTS AND FEES, II, (c).

## CLOUD ON TITLE.

See TRUSTEE, 179.

## COLLATERAL ATTACK.

### I. DISCHARGE.

### II. ADJUDICATION.

### III. TRUSTEE'S SALES.

### IV. IN GENERAL.

See TRUSTEE, 187.

### I. DISCHARGE.

1. A discharge in bankruptcy is conclusive in the absence of fraud and cannot be impeached collaterally by a creditor to whom no notice of the proceedings had been given. *Williams v. Butcher*, 12 N. B. R. 143.

2. Plaintiff brought action to collect a judgment against a discharged bankrupt, alleging want of notice of proceedings in bankruptcy due to bankrupt's procurement, and that after commencement of his action bankrupt removed his property with intent to defraud creditors. *Held*, that the discharge could not be impeached in a collateral action. *Howland v. Carson*, 16 N. B. R. 372.

3. Plaintiff alleged that he had no notice of the bankruptcy proceedings, and that such notice was not given because of the fraud of the bankrupt in representing in his schedule that plaintiff's residence was unknown to him when he actually knew such residence. *Held*, that the discharge could not be impeached collaterally on such grounds. *Rayl, Adm'r, etc., v. Lapham*, 15 N. B. R. 508.

4. A discharge duly granted, when pleaded in bar to an action in a state court, cannot be impeached on ground of fraud. *Smith v. Ramsey*, 15 N. B. R. 447.

### II. ADJUDICATION.

5. A creditor cannot impeach an adjudication in a collateral action on the ground that it was procured by fraud. *Michaels et al. v. Post, Ass.*, 12 N. B. R. 152; 21 Wall. 898.

### III. TRUSTEE'S SALES.

6. Where it is objected that the purchaser at an assignee's sale was the attorney for the assignee, and thereby incapable of purchasing, such objection must be set up in the bankrupt court and not in a collateral action. *Spilman v. Johnson*, 16 N. B. R. 145.



7. In a sale of real estate by the assignee in bankruptcy, assuming that it is to be assimilated to a sale under a decree in equity silent as to the manner of sale, it cannot be attacked collaterally and held absolutely void because not made in parcels. *Smith v. Scholtz et al.*, 17 N. B. R. 520.

#### IV. IN GENERAL.

8. Where the record shows jurisdiction, an adjudication cannot be assailed in a collateral action. *Sloan v. Lewis*, 12 N. B. R. 173; 23 Wall 150.

9. A record cannot be impeached without previous notice by proper form of pleading. *Id.*

10. If a party who is proceeded against by summary petition consents to a reference of the case to a register to take proof, he gives the court jurisdiction over his person, and cannot impeach its decree in a collateral action. *People ex rel. Jennys v. Brennan*, 12 N. B. R. 567.

11. Foreign judgments are only *prima facie* evidence of the debt adjudged to be due to the plaintiff, and such a judgment is open to examination, not only to show that the court was without jurisdiction of the subject-matter, but that it was fraudulently obtained. Domestic judgments cannot be collaterally impeached if rendered in a court of competent jurisdiction. *Michaels et al. v. Post, Ass.*, 12 N. B. R. 152; 21 Wall 308.

12. The judgment of a court having no jurisdiction of the subject-matter or parties is null and void and may be impeached in collateral proceedings, and the record of the court showing such jurisdiction may be contradicted by parol evidence. *In re McKibben*, 12 N. B. R. 97; Fed. Cas. 8,859.

13. A decree in bankruptcy, where public notice has been given as required, is in the nature of a proceeding *in rem*, and creditors must be treated as having notice of the proceedings, and cannot impeach them collaterally. *Shawhan v. Wherrett*, 7 How. 627.

14. The assignees cannot question collaterally the proceedings in a state court to which they voluntarily become parties. *Davis v. Friedlander*, 140 U. S. 510.

#### COLLUSION.

See PREFERENCE, 244.

1. A court will not permit a collusive agreement between the parties to a suit, in view of the impending bankruptcy of one of them, whereby the other party may absorb property that otherwise would go to the general creditors. *Samson, Ass. v. Burton et al.*, 5 N. B. R. 459; 5 Ben. 343; Fed. Cas. 12,386.

2. There is no such collusion as will deprive the parties of rights to which they would otherwise be entitled, where it is only shown that the parties endeavored to obtain all the advantage that the law would afford them. *Whithed et al. v. Pillsbury et al.*, 13 N. B. R. 241; Fed. Cas. 17,572.

3. The fact that the affidavit was filed and the execution issued and levied on the same day that judgment was rendered, and that voluntary proceedings in bankruptcy were begun on the same day, does not show collusion. *Witt, Ass. v. Hereth*, 13 N. B. R. 106; 6 Biss. 474; 8 Chi. Leg. News, 41; Fed. Cas. 17,921.

4. Where it appears that creditors can receive no more than the amount proposed, for composition, if ordinary administration is had, and there is no adequate proof of collusion, the composition should be approved. *In re Keiler*, 18 N. B. R. 36; 10 Chi. Leg. News, 299; Fed. Cas. 7,848.

#### COMMERCIAL PAPER.

##### I. WHAT IS.

- (a) *Under Bankrupt Act.*
- (b) *Of Manufacturer.*
- (c) *In General.*

##### II. PROOF OF.

- (a) *Who May Make.*
- (b) *How Made.*
- (c) *Effect of.*

##### III. PREFERENCES BY MEANS OF.

##### IV. EXCHANGE OF NOTES.

##### V. ACCOMMODATION PAPER.

##### VI. PARTNERSHIP PAPER.

##### VII. CONSIDERATION FOR.

##### VIII. COLLATERAL SECURITY.

##### IX. INDORSEMENT AFTER TRANSFER.

##### X. EQUITABLE ASSIGNMENT.

##### XI. INDORSER'S RELEASE.

##### XII. TRUSTEE'S RELATION TO.

## XIII. COMPOSITION NOTES.

## XIV. NOTICE.

- (a) *In General.*
- (b) *Of Dishonor.*
- (c) *Waiver of.*

## XV. PAYMENT.

- (a) *In General.*
- (b) *Suspension of.*

## XVI. IN GENERAL.

See BANK, 6, 16, 38; CONTRACTS, 1; CORPORATION, 11; DISCHARGE, 280; DIVIDEND, 18; INDORSERS, 139, 144, 151-153, 157, 197, 235, 242, 249; ESTATES, 229; ESTOPPEL, 2, 5, 17; EVIDENCE, 18; LIMITATIONS, STATUTE OF, 14; PETITION, 94, 98, 157; PLEADING AND PRACTICE, 312; SECURED CLAIMS, 35, 36, 66; SET-OFF, 6, 8, 9, 26; USURY, 2, 7, 16.

## I. WHAT IS.

(a) *Under Bankrupt Act.*

1. A draft is commercial paper within the meaning of the bankrupt act. In re Stevens, 5 N. B. R. 112; 1 Sawy. 397; 1 Pac. Law Rep. 45; Fed. Cas. 13,393.

2. The commercial paper mentioned in section 39 of the bankrupt act of 1867 includes not only the notes, bills, etc., given by a merchant or other person mentioned in the section, in the ordinary course of his business, but all negotiable paper. The terms are descriptive of the kind of paper, and not of the mode in which it was in fact issued in the given case. In re Chandler, 4 N. B. R. 66; 1 Lowell, 478; Fed. Cas. 2,591.

3. An accommodation note given as a loan to the payee is not commercial paper within the meaning of the bankrupt act. In re McDermott Patent Bolt Mfg. Co., 3 N. B. R. 33; 3 Ben. 369; Fed. Cas. 8,750. See *post*, 84.

(b) *Of Manufacturer.*

See COMPOSITION, 72.

4. The negotiable paper of a firm of manufacturers is commercial paper within the meaning of the act, regardless of the purpose for which it was given. In re Kenyon & Fenton, 6 N. B. R. 238.

5. Where a corporation is not authorized by law to invest its funds in commercial paper, notes discounted by it are not valid. In re Jaycox et al., 7 N. B. R. 578; Fed. Cas. 7,241.

6. A note given by one partner on the settlement of a copartnership manufacturing business, to pay for the interest of the copartner in the business, and to settle the balance appearing against him, is not the commercial paper of a manufacturer issued in the course of his business. In re Lanz, 14 N. B. R. 159; Fed. Cas. 8,079.

(c) *In General.*

7. "Commercial paper" means bills of exchange, promissory notes, bank checks and other negotiable instruments for the payment of money, which by their form and on their face purport to be such instruments as are by the law merchant recognized as falling under the designation of "commercial paper." In re Hercules Mutual Life Assurance Society, 6 N. B. R. 338; 6 Ben. 35; 6 Alb. Law J. 358; Fed. Cas. 6,402; In re Nickodemus, 3 N. B. R. 55; 2 Chi. Leg. News, 49; Fed. Cas. 10,254; In re Hollis, In re Kinney, 3 N. B. R. 83; Fed. Cas. 6,621.

8. Where a note is given to the indorser of a note as compensation for the indorsement, such note is valid. Providence Co. Sav. Bank et al. v. Frost, Tr., 13 N. B. R. 356; 8 Ben. 293; Fed. Cas. 11,453.

9. A note given to secure a loan made in foreign bank notes by a foreign corporation doing business by an agent, contrary to the provisions of an act to prevent illegal banking, is void. Tiffany v. Boatman's Sav. Inst., 9 N. B. R. 245; 18 Wall. 375.

10. A promissory note, executed at a time when Confederate money was a medium of exchange in the neighborhood in which it was executed, is commercial paper. Mendenhall v. Carter, 7 N. B. R. 320; Fed. Cas. 9,426.

11. An accommodation indorsement on a note does not make it commercial paper as to the accommodation indorser. Innes v. Carpenter, 4 N. B. R. 139; Fed. Cas. 7,049.

## II. PROOF OF.

See PROOF OF CLAIMS, 44.

(a) *Who May Make.*

12. After the maker of a note had been adjudged a bankrupt the note was protested, and a new note, with indorsers, given in payment of the old note. *Held*, that an indorser

on the note could not prove it against the estate of the maker. In *re Montgomery*, 3 N. B. R. 108 (2d Case); Fed. Cas. 9,780.

13. Commercial paper, acquired in good faith before maturity, may be proved in bankruptcy by the indorsee, upon showing a valid consideration paid by him. In *re Lake Superior S. C. R. R. & Iron Co.*, 10 N. B. R. 76; Fed. Cas. 7,998.

14. A surety upon bankrupt's note which is due may prove his demand under the act of 1841 before he has paid it. The bankrupt is released from liability to the surety upon the note though it is then unpaid. *Mace v. Wills*, 7 How. 272.

15. A check given to A., who becomes bankrupt before presentation, nevertheless entitles the payee to so much of the money of the bankrupt as the check calls for. *Fourth Nat. Bank of Chicago v. Bank of Michigan*, 10 N. B. R. 44.

16. Where an indorser of the bankrupt's paper has become absolutely liable to the holders before the filing of the petition, by notice of dishonor, he is not a creditor of the bankrupt at the time of the filing. In *re Riker*, 18 N. B. R. 893; Fed. Cas. 11,833.

17. The Liverpool correspondents of the bankrupts accepted drafts drawn on them by the bankrupts against consignments of merchandise which bankrupts agreed to make but failed to do. The holder of the drafts received fifty per cent. of the amount due on them, after they were dishonored, in full for all claims against the acceptors, but without prejudice to his rights against others. Afterwards the acceptors released all claims against bankrupts. *Held*, that the holder could prove against the bankrupts for the whole amount. In *re Baxter et al.*, 18 N. B. R. 497; 26 Pittsb. Leg. J. 140; Fed. Cas. 1,120.

18. A legacy was given to a wife of the residue of her father's estate, including the proceeds of both land and stock. Her husband reduced such legacy to possession and gave a note and check to his wife for the proceeds. He became bankrupt and the wife sought to prove the note and check in bankruptcy. *Held*, that the bequest created no separate estate in the wife, and that the note and check were nullities. *Canby, Ass., v. McLearn*, 18 N. B. R. 22; Fed. Cas. 2,378.

19. For the holder of the paper of a bank-

rupt to be able to prove his claim, he must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper. In *re Howard, Cole & Co.*, 6 N. B. R. 372; Fed. Cas. 6,751.

### (b) *How Made.*

20. A creditor having proved on two promissory notes asked leave to amend his proof to show that a new note had been given for which the two notes, which were proved by mistake, were part consideration. Leave to amend was denied, and it was held that the new note should be proved independently. In *re Montgomery*, 3 N. B. R. 109; Fed. Cas. 9,731.

21. A creditor offered proof against the estate of a bankrupt of a note in which the initials only of the first names of the parties appeared. No evidence was offered as to the full Christian names of either of the parties. The register refused the claim and his decision was approved. In *re Valentine*, 12 N. B. R. 389; 4 Biss. 817; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 16,812.

### (c) *Effect of.*

22. It is no ground of defense or suspension of an action on a joint or joint and several promissory note against a surety that the note has been proved as a claim against the principal in a court of bankruptcy. *Gregg v. Wilson*, 15 N. B. R. 142.

23. A certificate of deposit proved as a claim in bankruptcy is dishonored paper, and no longer has the qualities of a negotiable instrument. In *re Sime & Co.*, 12 N. B. R. 315; 8 Sawy. 805; Fed. Cas. 12,861.

## III. PREFERENCES BY MEANS OF.

See PREFERENCES, 27, 68, 114, 140, 156, 175, 264.

24. A party who has accepted a draft with intent to enable the drawee to prefer the payee is not liable thereon. *Fox et al. v. Gardner*, 12 N. B. R. 137; 21 Wall. 475.

25. The exchanging of new secured notes for old secured notes within four months of bankruptcy does not withdraw any property from the debtor's estate, and does not con-

stitute a preference. *Burnhisel v. Firman, Ass.*, 11 N. B. R. 505; 22 Wall. 170.

26. B. indorsed the note of F. and pledged bonds as security for the payment of the note, which was discounted at a bank. Afterwards another discount was obtained for F. upon like security, and a short time thereafter F. confessed judgment in favor of B. as security. B. paid the notes after they were twice renewed and then issued execution on his judgment, and property of F. was sold and credited on the judgment. *Held*, nothing in the transaction showed bad faith or the contemplation of a fraud upon the bankrupt law. *Field, Ass. v. Baker*, 11 N. B. R. 415; 12 Blatchf. 438; Fed. Cas. 4,702.

#### IV. EXCHANGE OF NOTES.

27. A., holding several notes of B., exchanged one of them for notes of the same amount of a firm in which B. was a partner. *Seem*, this arrangement, if made in contemplation of bankruptcy, would be a fraud on the joint creditors. *Held*, it could not be set aside when the bankruptcy occurred more than four months afterwards. In re *Lane & Co.*, In re *Boynton*, 10 N. B. R. 135; 2 Lowell, 833; Fed. Cas. 8,044.

28. One maker of a joint and several note gave the payee his individual note in payment of the joint note, and took a receipt which showed that the new note was received in full payment of the old note. *Held*, that the joint and several debt was paid. In re *Morrill*, 8 N. B. R. 117; 2 Sawy. 356; Fed. Cas. 9,821.

29. Where a note payable in one year is at the end of one year taken up and a new note for the same amount and time given in exchange, and this process repeated year after year, the debt will be deemed to have been contracted on the date of the last note. In re *Schumpert*, 8 N. B. R. 415; Fed. Cas. 12,491.

#### V. ACCOMMODATION PAPER.

30. As accommodation paper has no legal existence until transferred to a *bona fide* holder, the discounting of such paper given for the purpose of raising money by a bank at a higher rate of interest than the law allows is usurious and not defensible as a purchase. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 875.

31. Notes were executed in one state and sent to another state, where they were indorsed for the accommodation of the maker and discounted for his benefit. *Held*, that the contracts were made in the state where they were indorsed. *Providence Co. Sav. Bank et al. v. Frost, Trustee*, 13 N. B. R. 356; 8 Ben. 298; Fed. Cas. 11,453.

32. Where promissory notes are given as security to an accommodation indorser, action cannot be brought against the estate of the maker until the indorser is called upon to pay the notes which he has indorsed; nor can any one holding them who does not pay a valuable consideration, and without notice that the maker received no valuable consideration commensurate therefor, bring action against the maker. In re *Hook*, 11 N. B. R. 282; Fed. Cas. 6,672.

33. Making of notes is not such a representation as will estop the maker from showing them to be accommodation notes. In re *Dodge et al.*, 17 N. B. R. 504; 9 Ben. 480; Fed. Cas. 8,948.

34. An accommodation note is not commercial paper within the meaning of the bankrupt act. In re *Clemens*, 9 N. B. R. 57; 2 Dill. 533; 21 Pittsb. Leg. J. 30; Fed. Cas. 2,877. See §§ 3, 11, 57, 59.

#### VI. PARTNERSHIP PAPER.

See PARTNERSHIP, 144, 153, 167, 172-176; CONTRACTS, 1.

35. T. and S. were partners, and borrowed money, which they used for partnership purposes, giving therefor their joint note signed by their individual names instead of the firm name. *Held* to be a partnership debt. In re *Thomas & Sivyer*, 17 N. B. R. 54; 8 Biss. 139; 6 Cent. Law J. 151; Fed. Cas. 13,886.

36. Where an accommodation note was indorsed by one member of a partnership without the knowledge or consent of the other, it cannot be proved against the firm. In re *Irving et al.*, 17 N. B. R. 22; Fed. Cas. 7,074.

37. Notes drawn by one partner in the firm name, apparently in the course of the partnership business, without *mala fide* or actual knowledge by the holder of want of authority or intended misapplication, should be allowed against the bankrupt estate of

the firm. *Bush v. Crawford, Ass.*, 7 N. B. R. 299.

38. Two firms shared in a venture, and kept an account at bank in the name of one firm, adding the word "Co.," and so signed the checks. *Held*, that these checks did not establish a copartnership between the two firms, and that the holder of one of the checks thus signed could not file a petition in bankruptcy against the members of both firms. *In re Warner et al.*, 7 N. B. R. 47; 4 Pac. Law Rep. 123; Fed. Cas. 17,178.

39. Notes given by a solvent partner, after the dissolution of the partnership, to a creditor who had assisted in starting and dissolving the firm, and by way of settlement, will not be considered the commercial paper of such partner, he not being by business a merchant. *In re Weaver*, 9 N. B. R. 182.

## VII. CONSIDERATION FOR.

40. A note given in place of a lost note, if there was no consideration for the making of the original note, is not a sufficient claim on which to base a petition for bankruptcy proceedings. *In re Cornwall*, 4 N. B. R. 184; Fed. Cas. 8,251.

41. Suit being brought by the assignee of a negotiable promissory note against maker, negotiated before maturity, plaintiffs are not chargeable with notice of any right or equities against the note. *Maxwell v. McCune et al.*, 10 N. B. R. 806.

42. Want of consideration is no defense to a note against one who becomes a *bona fide* holder for value before the note is due. *Fogg Bros. v. Stickney, Ass.*, 11 N. B. R. 167; Fed. Cas. 4,898.

## VIII. COLLATERAL SECURITY.

43. Commercial paper on which a bank loans money, the paper being indorsed by the borrower, is not held by the bank as collateral security. *In re Weeks*, 13 N. B. R. 263; 8 Ben. 265; Fed. Cas. 17,349.

44. Pledges of promissory notes, void between the original parties thereto, which have been pledged to them as collateral security for the payment of an indebtedness, are entitled to prove so much of said notes as will secure dividends to the full amount of their claim. *Bailey, Ass., v. Nicholas*

*et al.*, 2 N. B. R. 151; 2 Amer. Law T. Rep. Bankr. 60; 1 Chi. Leg. News, 185; Fed. Cas. 741.

## IX. INDORSEMENT.

45. The payee of a negotiable bill or note, who sells or delivers the same before bankruptcy without indorsement, after bankruptcy may indorse it so that the holder may maintain an action thereon in his own name. *Hersey v. Elliott*, 18 N. B. R. 358.

46. A negotiable note, transferred by the payee before his death, by delivery only, may be indorsed by his administrator with the same effect as if done by himself in his lifetime. *Id.*

47. An indorser can claim no rights under a mortgage where he has paid nothing and is no longer liable, but he is liable to the assignee for moneys realized by him on the mortgage. *Sessions v. Johnson et al., Ass.*, 17 N. B. R. 65; 95 U. S. 847.

48. The holder of a promissory note who has received a sum of money from an indorser in discharge of the latter's liability may nevertheless prove it in full against the estate of the bankrupt promisor, paying over to the indorser the excess of the sum due holder. *In re Souther*, 9 N. B. R. 502; 2 Lowell, 820; Fed. Cas. 13,184.

49. An indorser of a note who receives none of the proceeds of the same, and whose contingent liability never becomes an absolute liability, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder, and while the debtor was carrying on the business. *Bean, Ass., v. Lafin*, 5 N. B. R. 333; Fed. Cas. 1,172.

## X. EQUITABLE ASSIGNMENT.

50. If a check is an assignment at all, it does not take effect as such until accepted or certified by the bank, or unless there is a previous promise to honor it. *In re Smith*, 15 N. B. R. 459; 2 Cin. Law Bul. 119; Fed. Cas. 12,990.

51. Where the amount of funds in the hands of a drawee of a draft is less than the amount drawn for, and the draft is not accepted, the mere presentation of the draft does not operate as an appropriation or equi-

table assignment of the funds. *Randolph & Co. v. Canby, Ass.*, 11 N. B. R. 296; Fed. Cas. 11,559.

52. Without presentation, acceptance, or payment, the simple drawing of a check does not transfer the fund drawn on to the amount of the check, from the drawer to the holder thereof. *Strain v. Gourdin et al.*, 11 N. B. R. 156; 2 Woods, 380; Fed. Cas. 13,521.

53. An order drawn for the whole of a particular fund is an equitable assignment thereof, and, after notice to the drawee, binds the fund. In such case, a suit in *assumpsit* may be maintained in the name of the assignor to the use of the assignee. *Walker, Ass., v. Seigel et al.*, 12 N. B. R. 394; 2 Cent. Law J. 508; Fed. Cas. 17,085.

54. Bank's claim against bankrupt was founded on three notes on which bankrupt was indorser, on one of which the maker had been given an extension of time. *Held*, that the extension of time released the indorser and that such note should be expunged from the claim. In *re Granger & Sabin*, 8 N. B. R. 30; Fed. Cas. 5,684.

55. If the holder of a note assents to the discharge of the maker without the consent of the indorser, this releases the indorser. In *re McDonald*, 14 N. B. R. 477; 24 Pittsb. Leg. J. 42; Fed. Cas. 8,753.

56. An indorser on a demand note cannot be held if the note be not presented for four years after the making thereof. In *re Crawford*, 5 N. B. R. 301; Fed. Cas. 3,364.

#### XI. INDORSER'S RELEASE.

57. The holder of an accommodation note, knowing it to be such, signed a resolution in favor of composition in bankruptcy proceedings instituted against an indorser. *Held*, that the maker of the note was not released from liability. *Guild v. Butler*, 16 N. B. R. 347.

58. Under the nineteenth section of the bankruptcy act of 1867 an indorser does not become liable as a principal debtor by the mere fixing of his liability as indorser. In *re Loder*, 4 N. B. R. 50; 4 Ben. 305; Fed. Cas. 8,457.

59. The holder of an accommodation note given by A. to B. gave, for a valuable consideration, an extension of time to B. without A.'s assent. *Held*, that A. was released. *The Valley Nat. Bank v. Meyers, Ass. etc.*, 17 N. B. R. 257; Fed. Cas. 16,821.

60. Before proving against the estate of an indorser, claimant received a dividend from the estate of the maker of notes. *Held*, that he could prove only for the balance. In *re Hicks et al.*, 19 N. B. R. 299; Fed. Cas. 6,456.

61. A bank obtained payment of a dishonored bill of exchange by the acceptance within four months of his bankruptcy. The assignee recovered the amount paid. In a suit against the indorser by the bank, *held*, that the holder having taken a preference without the indorser's consent and so prevented the indorser, for that time, from indemnifying himself, the indorser was discharged. *Northern Bank of Kentucky v. Cooke*, 18 N. B. R. 306.

62. So long as both payments do not exceed the face of the note, payments made by the maker after the note has been proved against an indorser will not affect the amount due from the estate. In *re Weeks*, 13 N. B. R. 263; 8 Ben. 265; Fed. Cas. 17,349.

63. Where commercial paper is indorsed by a firm in its firm name, and also by the individual name of one or more members of the firm, and the maker of the note becomes embarrassed and bankruptcy ensues to the indorsers of the note, and the holders accept, with permission of court, forty per cent. from the makers, they are only entitled to dividends against the indorsers, individually and as a firm, to an amount equal to their claims after deducting the forty per cent. received from the makers. In *re Howard et al.*, 4 N. B. R. 185; Fed. Cas. 6,750.

#### XII. TRUSTEE'S RELATION TO.

##### See TRUSTEE, 24.

64. The mere presentation of an ordinary commercial bill of exchange to the drawee, without acceptance by the latter, who holds funds of the bankrupt by whom the bill is drawn, does not operate as an appropriation or equitable assignment of the amount drawn for, and creates no lien as against such funds, and the assignee of the bankrupt will be entitled to the funds. *Randolph & Co. v. Canby, Ass.*, 11 N. B. R. 296; Fed. Cas. 11,559.

65. Plaintiff tendered to the assignee of an insolvent bank, in payment of a judgment against himself in favor of the bank, a

protested draft drawn by defendant bank on a second bank in favor of a third bank, and indorsed by the last to plaintiff. *Held*, that the assignee could not accept the protested draft in payment. *Bashore et al. v. Rhoads et al.*, 16 N. B. R. 72.

66. A state court has no jurisdiction to enjoin the assignee from collecting a note payable to the bankrupt. *Southern et al. v. Fisher, Trustee*, 16 N. B. R. 414.

### XIII. COMPOSITION NOTES.

See COMPOSITION, 89.

67. A petition in involuntary bankruptcy was filed against R. and F., a firm. The debtors proposed a composition which was accepted by two-thirds of the creditors, representing more than one-half of the entire indebtedness, whereby the creditors were to receive a certain percentage of the amount due them, payable in notes "satisfactorily indorsed" and maturing at stated periods. *Held*, that the provision as to indorsement was too indefinite. *In re Reiman & Friedlander*, 11 N. B. R. 21; 7 Ben. 455; Fed. Cas. 11,673.

### XIV. NOTICE.

#### (a) *In General.*

68. Where a holder of promissory notes indorsed by the bankrupt purchased them for an exceedingly low price, and was aware of trouble between the maker and the indorser, he must be charged with knowledge which he might have obtained if he had made inquiry, and also with notice of the bankrupt's insolvency. *In re Hook*, 11 N. B. R. 282; Fed. Cas. 6,672.

69. It is no defense to a claim that a note was misapplied if it be received in the usual course of business for value, and without notice to the *bona fide* holder of any equities or defenses between the maker and indorser. *Merchants' Nat. Bank of Syracuse v. Comstock*, 11 N. B. R. 285.

70. A. was adjudged bankrupt, prior to which he conveyed his homestead in trust to secure a debt. This property was ordered to be sold by the bankruptcy court, in satisfaction of a deed of trust. Subsequently, bankrupt and appellant made contract about rent,

and a note was given therefor. The maker of the note became the purchaser at assignee's sale. *Held*, the state supreme court could not review a decision of United States district court, and that suit being brought by assignees against the maker of negotiable paper, negotiated before maturity, plaintiffs are not chargeable with notice of any rights or equities against the note, and the appellees are entitled to judgment. *Maxwell v. McCune et al.*, 10 N. B. R. 306.

71. At law a principal may maintain an action to recover from a bank the proceeds of a discount of his own note which were placed to the credit of his agent, and where the bank, at the time of the deposit, had no notice that it did not belong to the agent. *Voight v. Lewis, Tr.*, 14 N. B. R. 548; 11 Phila. 511; 33 Leg. Int. 402; 9 Chi. Leg. News, 65; 11 Bankers' Mag. (3d S.) 481; 8 N. Y. Wkly. Dig. 421; 24 Pittsb. Leg. J. 54; Fed. Cas. 16,989.

#### (b) *Of Dishonor.*

72. A note given by a member of a firm was indorsed by the firm, and before maturity the firm became bankrupt. *Held*, that they were not entitled to notice of dishonor, and that the note might be proved against the joint assets. *Russell, Ex parte, In re Paul & Son*, 16 N. B. R. 470; Fed. Cas. 12,148.

#### (c) *Waiver of.*

73. Where a bankrupt is indorser on a note which falls due after the adjudication of bankruptcy and before the appointment of an assignee he may waive demand and notice. *Tremont Nat. Bank, Ex parte, In re Battey*, 16 N. B. R. 397; 2 Lowell, 409; 25 Pittsb. Leg. J. 84; Fed. Cas. 14,169.

### XV. PAYMENT.

#### (a) *In General.*

74. In actions against the acceptor payment by the drawer is no plea, but only converts the holder into a trustee for the drawer. *In re Souther*, 9 N. B. R. 502; 2 Lowell, 320; Fed. Cas. 18,184.

75. Plaintiff held a promissory note executed jointly by defendants and one G., who made a payment and was adjudicated bankrupt within four months thereafter. Defend-

ants paid the balance to plaintiff's clerk and obtained the note, the clerk being ignorant of the facts. The bankrupt's payment was recovered by the assignee and plaintiff sued for the amount of said payment. *Held*, he could recover. *Watson v. Poague et al*, 15 N. B. R. 473.

### (b) *Suspension of.*

See ACTS OF BANKRUPTCY, 31-48, 65, 76.

76. It is unnecessary to show the stoppage of payment to have been fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by the act of 1867. *In re Cowles*, 1 N. B. R. 42; 1 West. Jur. 367; Fed. Cas. 8,297.

## XVI. IN GENERAL.

77. A petition in involuntary bankruptcy alleged that a certain corporation had suspended payment of its commercial paper and had not resumed within fourteen days (act of 1867). There was no allegation that the suspension and non-resumption were fraudulent. The adjudication as asked was refused, but the petition was allowed to be amended by inserting the word "fraudulent." *In re Jersey City W. G. Co.*, 1 N. B. R. 113; 7 Amer. Law Reg. (N. S.) 419; 1 Amer. Law T. Rep. Bankr. 61; Fed. Cas. 7,292.

78. When a banker, merchant or trader fraudulently stops or suspends payment of his commercial paper and does not resume within fourteen days, he commits an act of bankruptcy (act of 1867). There must be a stopping or suspension of payment, and also a non-resumption within fourteen days; and such suspension and non-resumption must be fraudulent in the sense in which that term is employed in the act. *Id.*

79. The suspension of payment by a manufacturing company and non-resumption of payment within fourteen days does not of itself constitute an act of bankruptcy. *Id.*

80. A suspension of payment of commercial paper for fourteen days is not, in the absence of fraud, an act of bankruptcy (act of 1867). *In re Leeds*, 1 N. B. R. 138; 25 Leg. Int. 140; Fed. Cas. 8,205.

81. The suspension of payment of commercial paper mentioned in section 39 of

the bankrupt act (1867) must be done purposely and be continued for fourteen days. *In re Hollis*, *In re Kenney*, 3 N. B. R. 82; Fed. Cas. 6,621.

82. Failure to pay a particular note because it is claimed that there is a good defense to it is not an act of bankruptcy (act of 1867). *In re Manheim*, 7 N. B. R. 342; 6 Ben. 270; 5 Chi. Leg. News, 149; Fed. Cas. 9,038; *In re Munn*, 7 N. B. R. 468; 3 Biss. 442; Fed. Cas. 9,925; *In re Staplin*, 9 N. B. R. 142; 5 Chi. Leg. News, 523; Fed. Cas. 13,804.

83. Any creditor may have his debtor adjudged a bankrupt, although the note which had remained unpaid for fourteen days had been paid before the petition was filed, if the debtor's whole liabilities were not paid (act of 1867). *In re Ess et al*, 7 N. B. R. 133; 3 Biss. 301; 4 Chi. Leg. News, 357; Fed. Cas. 4,530.

84. The continued non-payment of commercial paper by a merchant or trader is, as it were, a continuous act of bankruptcy, and not such a definite, final and completed act that it could not after six months be made the basis of an adjudication (act of 1867). *In re Raynor*, 7 N. B. R. 527; 11 Blatchf. 43; Fed. Cas. 11,597.

85. The maker of a note is not bound, as to the validity of the note, by an order of assignment by the court. When the action is brought he may make his defense to the note. *Lamb, Ass. v. Lamb*, 13 N. B. R. 17; 6 Biss. 420; 7 Chi. Leg. News, 411; 21 Int. Rev. Rec. 317; 1 N. Y. Wkly. Dig. 318; Fed. Cas. 8,018.

86. C. and D. were jointly indebted to A. on promissory notes; by bankruptcy A. became indebted in a larger amount than the notes to C. and E., partners, on a policy of insurance, and on C.'s petition to have his share of the joint liability set off against a like amount due on the policy, *held*, that there being no mutual debts or mutual credits, the bankrupt law allowed no such set-off. *Gray v. Rollo*, 9 N. B. R. 337; 18 Wall. 629.

87. The drawer of a bill, made and dated at his place of business, undertakes to pay there in case of dishonor, even though the bill was negotiated at some other place. *In re Glyn*, 15 N. B. R. 405.

88. In case of dishonor of a bill drawn in this country on a foreign bank, the law of damages is a part of the law of performance.



not of the remedy or execution and validity of the contract. *Id.*

89. The assignee of a note executed for the purchase price of land is not entitled to the security of the equitable vendor's lien thereon, such lien being personal and not assignable. *In re Brooks*, 2 N. B. R. 149; 2 Amer. Law T. Rep. Bankr. 66; Fed. Cas. 1,943.

90. While the law merchant protects the bank in its dealings with the holder of negotiable paper, it does not throw any protection about the security, except when it is negotiable in character. *In re Kansas City S. & M. Mfg. Co.*, 9 N. B. R. 76; Fed. Cas. 7,610.

91. A note was given for a balance in a large transaction had about the commencement of the war, a portion of the subject of which was negroes. *Held*, that the note, having been executed prior to the emancipation proclamation, was valid. *In re Miller v. Keys*, 8 N. B. R. 54; Fed. Cas. 9,578.

92. A promissory note given by an officer of a railroad corporation, signing his own name and affixing his official title as *descriptio personae*, may be shown by parol testimony to be the act of the corporation. *In re S. Minn. R. R. Co.*, 10 N. B. R. 86; Fed. Cas. 13,188.

93. "When a man enters the commercial community as a merchant, trader, banker or otherwise, he assumes all the responsibilities which attach to his calling—to take care of all his commercial paper, whether made before or after he commenced business, and whether given by him as a result of his particular business, or as a result of a transaction not directly within the scope of that business." *In re Carter*, 6 N. B. R. 299; 4 Chi. Leg. News, 187; 3 Leg. Op. 221; 6 Amer. Law Rev. 755; Fed. Cas. 2,470.

94. In general, an express authority is not indispensable to confer upon a corporation the right to borrow money or to become a party to negotiable paper. *In re Hercules Mut. L. Ass. Soc.*, 6 N. B. R. 838; 6 Ben. 35; 6 Alb. Law J. 353; Fed. Cas. 6,402.

#### COMMISSION MERCHANT.

See AGENT, 14, 16; FIDUCIARY DEBT, 1.

#### COMMITTEE.

##### I. COMPENSATION.

##### II. GENERALLY.

See TRUSTEE, 228.

##### I. COMPENSATION.

1. One of the members of a committee, under sec. 5103, R. S., rendered services to trustee in preparing for market a stock of tobacco and in effecting settlement of litigation. On application for compensation, *held*, that claimant was not entitled to compensation. *In re Bonnett et al.*, 19 N. B. R. 309; Fed. Cas. 1,634.

2. The members of a committee of creditors provided for by section 43 (act of 1867) are entitled to compensation for their services, but this compensation should be limited to such an amount as will afford a reasonable compensation for the services required, and should not be based upon the usage, nor upon the special qualifications of the person who may happen to perform the services. *In re Treat*, 10 N. B. R. 310; Fed. Cas. 14,160.

##### II. GENERALLY.

3. It is a substantial objection to a resolution under section 43 of the act of 1867, appointing a trustee and committee, that the committee is composed of only two, of which one is the trustee. *In re Stillwell*, 2 N. B. R. 164; Fed. Cas. 13,447.

4. A creditor who claims a preference which is contested is an improper person to be one of committee selected according to section 43 of the act of 1867. *In re Stuyvesant Bank*, 6 N. B. R. 272; 5 Ben. 566; Fed. Cas. 13,581.

5. Application was made for relief against action of trustee and majority of committee chosen to assist him in allowing counsel fees alleged to be excessive. *Held*, that the act of the majority is the act of the committee. *In re Baxter et al.*, 19 N. B. R. 295; Fed. Cas. 1,122.

#### COMMON CARRIERS.

See CORPORATIONS.

1. Common carriers are insurers and liable in all events and for every loss or dam-

age however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident without fault or negligence on the part of the carrier, and expressly excepted in bill of lading. *Sweatt v. Boston, H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 1 Amer. Law T. 173; 6 Amer. Law Rev. 163; Fed. Cas. 13,684.

2. A common carrier is not a trader, and a mortgage given by a railroad company is not an act of unusual character within the meaning of the bankrupt act. In re *Union Pacific R. R. Co.*, 10 N. B. R. 178; 6 Chi. Leg. News, 355; Fed. Cas. 14,376.

### COMPENSATION.

See COSTS AND FEES.

### COMPROMISE.

1. A compromise is not justified in a case where the due administration of the bankrupt law requires the settlement of the questions of law involved, although the expense and delay of litigation is considerable. In re *Rowe et al.*, 18 N. B. R. 428; Fed. Cas. 12,092.

2. Before filing a voluntary petition in bankruptcy, the debtors assigned a number of claims to their attorneys, and paid them \$150 for services rendered and to be rendered in the bankruptcy proceedings. The attorneys collected some of the claims. The assignee sued for the money and claims, alleging that the transfer was void. After issue joined, the assignee applied to compromise the claim. *Held*, that it was not a proper case for compromise. *Id.*

3. Where a resolution was offered at first meeting of creditors that the court be requested to make an order authorizing assignee to compromise certain debts due bankrupt, with consent of three creditors as a committee, which resolution was passed, *held*, that such order was not warranted by any provision of the act, or by any order. In re *Diblee et al.*, 3 N. B. R. 17; 8 Ben. 354; Fed. Cas. 3,885.

4. Efforts by bankrupt's friends to compromise and buy up his debts and stop proceeding in bankruptcy are no fraud upon the bankrupt act. In re *Frank*, 5 N. B. R. 194; 5 Ben. 164; Fed. Cas. 5,050.

### CONDITIONAL DELIVERY.

A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same is paid. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

### COMPOSITION.

#### I. WHEN CONFIRMED.

- (a) *General.*
- (b) *Effect of.*
- (c) *Time Limit.*
- (d) *In Collateral Actions.*
- (e) *Best Interest of Creditors.*
- (f) *Estoppel.*

#### II. WHEN SET ASIDE.

- (a) *General.*
- (b) *For Fraud.*
- (c) *Notice.*
- (d) *Failure to Carry Out.*

#### III. OBJECTIONS TO.

- (a) *General.*
- (b) *On Account of Fraud.*
- (c) *To Petition and Schedule.*

#### IV. CLAIMS INCLUDED.

- (a) *General.*
- (b) *Preferences.*
  - (1) *Fraudulent.*
- (c) *Secured.*
- (d) *Estoppel.*
- (e) *Lien of.*
- (f) *Set-off.*
- (g) *Commercial Paper.*

#### V. COURTS.

- (a) *Attachments.*
- (b) *Injunctions.*
- (c) *Arrest.*
- (d) *Judgments.*

#### VI. COMPOSITION MEETING.

- (a) *General.*
- (b) *Voters.*
  - (1) *Number Required.*
- (c) *Examination of Bankrupt.*
- (d) *Resolutions.*

#### VII. DEFERRED PAYMENTS.

- (a) *General.*
- (b) *Security for.*

#### VIII. REVIVAL OF DEBT.

#### IX. GENERAL ASSIGNMENT—EFFECT UPON.

#### X. DISCHARGE.

- (a) *General.*
- (b) *Disposition of Assets.*

**X. DISCHARGE—continued.***(c) Effect of.**(d) From Debts.*

See **COMMERCIAL PAPER**, 57, 67; **COSTS AND FEES**, 4; **ESTATES**, 5, 53, 206; **FRAUD**, V; **LACHES**, 9; **PARTNERS**, 39, 51, 52; **PAYMENT**, 6; **SALE**, 48.

**I. WHEN CONFIRMED.***(a) General.*

1. Where a composition is made before adjudication, the fact that the debtor retains the possession of his assets is no ground for refusing to ratify it. In re Van Auken et al., 14 N. B. R. 425; Fed. Cas. 16,828; R. S. 5014.

2. A provision that the debtor may retain his assets does not defeat a composition, it being surplusage, and on the application of a creditor a warrant may be issued, notwithstanding the terms of the provision. Id.

3. If the confirmation is examined by the register he may be considered to do so under a special order, and the time taken may be added to that spent in examining the resolution. In re Spillman, 13 N. B. R. 214; 8 Chi. Leg. News, 140; 23 Pittsb. Leg. J. 87; Fed. Cas. 13,242.

*(b) Effect of.*

4. Creditors who have accepted a composition are not entitled to vote for an assignee. Ex parte Hamlin, 16 N. B. R. 320; 2 Lowell, 571; 5 Cent. Law J. 281; Fed. Cas. 5,993.

5. The principal element in determining whether the debtor should be allowed to keep his property is his personal and business character, the composition being otherwise fair. In re Wilson et al., 18 N. B. R. 300; Fed. Cas. 17,785.

6. A bankrupt whose composition, whereby a certain percentage shall be paid, has been properly accepted, cannot add to the provisions of said composition by demanding a discontinuance and the surrender of the property before the percentage is paid. In re McKeon, 11 N. B. R. 182; 7 Ben. 513; 3 Amer. Law Rec. 611; 11 Alb. Law J. 7; Fed. Cas. 8,858.

7. If an offer of composition is accepted, the payment is for the satisfaction of the

debts and not as a dividend from the estate in bankruptcy. In re Lissberger, 18 N. B. R. 230; Fed. Cas. 8,384.

8. The confirmation of a composition does not give the assent of the court to what the resolution vainly attempts to effect. In re Hyman et al., 18 N. B. R. 299; Fed. Cas. 6,985.

9. On a motion to dissolve an injunction by which a judgment creditor was restrained from arresting the bankrupt on execution, the question arose, a composition having been offered, whether fiduciary debts would be released by the confirmation of a composition. It was held that such debts are discharged by a composition. In re Rodger et al., 18 N. B. R. 252; Fed. Cas. 11,991.

*(c) Time Limit.*

10. It is for the creditors to consider the question of the time within which the debtor can pay the composition, and, unless sufficient reasons are shown, their judgment will not be reversed. In re Wilson et al., 18 N. B. R. 300; Fed. Cas. 17,785.

11. A resolution of composition providing that it should be consummated in a limited time or be void was approved. A question arose as to what amounted to consummation. It was held that it must be consummated as to all the creditors within the given time or it would be void as to all. Evans et al. v. Gallantine, 18 N. B. R. 311.

12. The confirmation of a composition need not be made at a meeting. In re Spillman, 13 N. B. R. 214; 8 Chi. Leg. News, 140; 23 Pittsb. Leg. J. 87; Fed. Cas. 13,242.

13. Upon the adoption of a resolution of composition a reasonable time may be given in which to secure the additional signatures necessary to confirm it. Spades, In re, In re Muir et al., 13 N. B. R. 72; 6 Biss. 448; 8 Chi. Leg. News, 33; Fed. Cas. 13,196.

*(d) In Collateral Actions.*

14. The decision of the district court that a resolution which provides for payment in notes of the bankrupt is valid, is conclusive in a collateral action. Smith et al. v. Engle et al., 14 N. B. R. 481; R. S. 5044.

15. The determination of the district court that a proper proportion of the credit-

ors have confirmed a composition cannot be impeached in a collateral action. *Id.*

16. A resolution of composition will be valid in a collateral action, although the signatures of the bankrupt and the creditors in confirmation of the resolution are attached to a separate paper. *Id.*

(e) *Best Interest of Creditors.*

17. A bankrupt acted in a manner not calculated to benefit his creditors, but when in composition it appeared that the creditors would be benefited by the composition as affairs then stood, the court refused to set it aside. *In re Allen et al.*, 17 N. B. R. 157; 17 Alb. Law J. 170; 25 Pittsb. Leg. J. 143; 6 N. Y. Wkly. Dig. 43; 2 Month. Jur. 58; Fed. Cas. 210.

18. If the debtor proposes an advance in the percentage of composition, such offer is demonstrative of the fact that the original offer is not for the best interest of the creditors. *In re Scott et al.*, 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

19. Objections can be presented at the hearing for the ratification of the resolution, as to the due passage thereof, as to the confirmatory signatures, and as to what is to the best interest of the parties. *Id.*

20. A composition of five per cent. will be sustained where there are no other assets of value nor probability of dividend, though an assignee and the creditors are acting in good faith. *In re Odell et al.*, 16 N. B. R. 501; 9 Ben. 247; Fed. Cas. 10,427.

21. Either party may furnish testimony on the question whether the composition is for the best interest of all, and such evidence may be oral or written. *In re Keller et al.*, 18 N. B. R. 331; Fed. Cas. 7,654.

22. The fact that there is no security for the payment of composition notes is one of the facts which together with the other facts is to be considered in determining whether the composition is for the best interests of all concerned. *In re Wilson et al.*, 18 N. B. R. 800; Fed. Cas. 17,785.

23. Unless specific errors in the action of the creditors or the lower court, on a composition, can be pointed out, which would change the judgment, the question of the composition being to the best interests of the creditors will not be inquired into by the ap-

pellate court. *In re Wronkow*, 18 N. B. R. 81; 26 Pittsb. Leg. T. 2; Fed. Cas. 18,105.

24. Where creditors can receive no more than the amount proposed for composition, if ordinary administration is had, and there is no proof of collusion, the composition should be approved. *In re Keiler*, 18 N. B. R. 86; 10 Chi. Leg. News, 299; Fed. Cas. 7,648.

25. Debtor, desiring to proceed with his business, induced his friends to pay more in composition than his estate would pay in bankruptcy. On objection to composition, it was held that it should be confirmed. *In re Snelling*, 19 N. B. R. 120; Fed. Cas. 13,140.

26. Where it is made to appear that a settlement in bankruptcy would be more for the interest of creditors, the court has power to reject a composition, though opposed by a small minority of the creditors. *In re Whipple*, 11 N. B. R. 524; Fed. Cas. 17,513.

27. In the absence of fraud, the question for the court seems to be, not whether the debtor might have offered more in composition than he has offered, but whether his estate would pay more in bankruptcy. *In re Morris*, 11 N. B. R. 443.

28. Any composition which is satisfactory to the requisite majority of the creditors and is for the best interest of all is allowed by the statute. *In re Purcell*, 18 N. B. R. 447; Fed. Cas. 11,470.

29. Where a resolution of composition is against the best interests of all concerned, it will not be confirmed. *In re Weber F. Co.*, 13 N. B. R. 529; Fed. Cas. 17,330.

30. The court will take into account the relations of the creditors favoring the compromise to the debtor in deciding a motion to confirm, and also the relative number of creditors whose individual opinions were expressed in favor of the resolution. *Id.*

(f) *Estoppel.*

31. Where creditors who have received full payment of debt sign a composition agreement whereby other creditors are injured, they are estopped from denying its validity. *Bean v. Brookmire et al.*, 7 N. B. R. 568; 2 Dill 108; 5 Chi. Leg. News, 814; 2 Amer. Law Rec. 222; 6 Amer. Law T. Rep. 418; 7 West. Jur. 324; Fed. Cas. 1,170.

## II. WHEN SET ASIDE.

(a) *General.*

32. On motion to vacate composition, the court held that bankrupt was at liberty to deal with his assets as he pleased, provided no fraud was practiced. *In re Shaw et al.*, 19 N. B. R. 512; Fed. Cas. 12,716.

(b) *For Fraud.*

33. A creditor who signed a composition expected to obtain a personal advantage. Another creditor who did not sign had expressed his intention to oppose, and was paid not to oppose. There was no evidence that the bankrupt knew anything of the payment. The composition was set aside. *In re Sawyer*, 14 N. B. R. 241; 2 Lowell, 475; 8 N. Y. Wkly. Dig. 143; Fed. Cas. 12,895.

34. When a debtor seeks to make a composition by the payment of a part, he is not bound to make any representations concerning his assets; but he must act in good faith, and if he does make representations which are not true he is guilty of fraud, and the creditors are not bound by the composition fraudulently procured. *Elfelt v. Snow*, 6 N. B. R. 57; 2 Sawy. 94; Fed. Cas. 4,342.

35. A partner effected a composition, but at the direction of a creditor he misrepresented the assets and liabilities, and its liabilities to such creditor, with the object of saving a large amount and paying it as a preference to said creditor, and said amounts were paid to said creditor in fraud of the rights of other creditors. A petition subsequently filed by such partner to put his firm into bankruptcy was dismissed. *In re Hamlin et al.*, 16 N. B. R. 522; 8 Biss. 122; 10 Chi. Leg. News, 131; Fed. Cas. 5,994.

36. A creditor received money to vote for a composition. Attorneys for other creditors were suspicious at the time, but made no effort to investigate. Bankrupt contracted new obligations on the faith of the composition. Petition was filed two years after final order in composition to set it aside. It was held that the doctrine of laches applies and petition was dismissed. *In re Herman et al.*, 17 N. B. R. 440; 9 Ben. 436; Fed. Cas. 6,405.

(c) *Notice.*

37. Notice of application to set aside a composition was sent to the debtor, but not to the creditors. It was held that all creditors were entitled to notice. *Ex parte Hamlin*, 16 N. B. R. 320; 2 Lowell, 571; 5 Cent. Law J. 281; Fed. Cas. 5,993.

(d) *Failure to Carry Out.*

38. Where a composition is secured by consent of the creditors, and by its terms new liabilities are created with other parties, the creditors cannot have it set aside because the bankrupts have failed to comply with its terms. *In re Ewing et al.*, 17 N. B. R. 109; Fed. Cas. 4,588.

39. Having failed to pay according to the terms of his composition, a bankrupt cannot protect himself by it from an action at law. *Nat. M. W. Bank v. Porter et al.*, 17 N. B. R. 329.

40. Bankrupt offered a composition, which was accepted and certain of the creditors paid. On application to set aside the composition and appoint an assignee, it was held that the appointment should be made, but that rights acquired under the composition were not to be prejudiced. *Ex parte Hamlin*, 16 N. B. R. 320; 2 Lowell, 571; 5 Cent. Law J. 281; Fed. Cas. 5,993.

41. A composition was accepted and confirmed, but afterwards, because of the debtor's inability to carry it into effect, it was set aside. The proceedings were on an involuntary petition. Before the order was made to set the composition aside the debtor filed a voluntary petition and was adjudicated. It was held that, there being no adjudication on the first petition, it was no bar to the voluntary petition. *In re Flanagan*, 18 N. B. R. 439; 26 Pittsb. Leg. J. 128; 5 Sawy. 812; Fed. Cas. 4,850.

## III. OBJECTIONS TO.

(a) *General.*

42. Where a debtor deceives his creditors into a vote on a composition which they would not have given had they known the facts, the court will withhold assent to the composition, if satisfied that the proceedings were collusive, even if there is only one dissenting

creditor. In re Keiler, 18 N. B. R. 36; 10 Chi. Leg. News, 299; Fed. Cas. 7,648.

43. A firm and one member, individually, made a general assignment. Creditors then instituted proceedings in bankruptcy against the firm and its members, and adjudication was made. One member afterward proposed a composition which was accepted by the requisite number. Objection being made to the composition, the court held that the individual member could properly make such proposition. Pool v. McDonald et al., 15 N. B. R. 560; 9 Chi. Leg. News, 322; 4 Law & Eq. Rep. 27; 2 Cin. Law Bul. 151; Fed. Cas. 11,288.

(b) *On Account of Fraud.*

See COLLUSION, 1.

44. There was a discrepancy between the compromise offered and the value of the debtor's property and other *indicia* of fraud. The district court refused to record the composition without notice and hearing of the parties concerned. On petition in review it was held that the district court erred. In re The Weber F. Co., 18 N. B. R. 559; Fed. Cas. 17,331.

45. Where the record shows on its face by the debtor's statement that his estate is able to pay a larger dividend than that offered in composition, the dissenting creditors may rely upon this statement and are not bound to prove the facts. In re Weber F. Co., 18 N. B. R. 529; Fed. Cas. 17,830.

(c) *To Petition and Schedule.*

See PETITION, 122.

46. A composition is not rendered void by the omission of an asset from the statement of debts and assets when such omission was without fraud and with the knowledge of the creditors, and such asset is not of sufficient value to require the alteration of the terms of the composition. The testimony of the debtor at the meeting of creditors is considered as part of his statement. In re Reiman et al., 18 N. B. R. 128; 12 Blatchf. 562; Fed. Cas. 11,675.

47. The word "creditors," in the section of the act relating to composition, means all whose debts are provable in bankruptcy. The creditor may prove the true amount of

a disputed claim. In re Trafton, 14 N. B. R. 507; 2 Lowell, 505; Fed. Cas. 14,133.

48. A mistake without fraud, made by the debtor in his statement of the amount due to a creditor, will not vitiate a composition. *Id.*

49. In the schedule furnished by the bankrupt in composition one debt was understated, but not intentionally. It was held that such mistake would not avoid the composition. Beebe v. Pyle, 18 N. B. R. 162.

50. In composition, the statement should conform to the schedule in bankruptcy. In re Haskell, 11 N. B. R. 164; 1 Cent. Law J. 531; Fed. Cas. 6,192.

51. Where the facts were brought out by the testimony and considered by the creditors in coming to the conclusion to accept the composition, it is not a good objection that property standing in the name of the bankrupt's wife should have been included in the schedules. In re Welles, 18 N. B. R. 525; Fed. Cas. 17,377.

52. Unless clearly made out the objection to a composition that the estate could pay more is not one that will avail. *Id.*

53. The fact that the schedules stated the real estate of the debtor as of uncertain value is not a good objection to a composition. *Id.*

#### IV. CLAIMS INCLUDED.

(a) *General.*

54. A advanced money to B. with the understanding that B. should not be pressed for payment, but with no contract delaying or deferring payment, and no misrepresentations were made to B.'s creditors. A. was held entitled to share in the dividends of B.'s estate under a composition. In re Lane et al., 10 N. B. R. 185; 2 Lowell, 333; Fed. Cas. 8,044.

55. In a composition it makes no difference to what time interest is computed, if all the debts are treated alike. Beebe v. Pyle, 18 N. B. R. 162.

(b) *Preference.*

See PREFERENCE, 70.

56. A bankrupt had no assets of value. A creditor who was entitled to preference objected to a confirmation of the composition unless his claim was paid in full or unless the confirmation be had subject to his claim.

It was held that his priority extended only to the assets. In *re Chamberlin*, 17 N. B. R. 50; 9 Ben. 149; Fed. Cas. 2,580.

57. A debtor gave preferences to creditors who knew of his insolvency. A little more than two months after the preference bankruptcy proceedings were commenced. Thereupon the debtors proposed a composition. The composition was accepted by the requisite number, but objected to by a minority. It was held that the composition would not be confirmed unless the *pro rata* offered to the creditors equaled the amount they would have been entitled to if no preference had been made. In *re Jacobs*, 18 N. B. R. 48; Fed. Cas. 7,159.

58. A stipulation by a creditor for a secret advantage is altogether void. Not only can he take no advantage from it, but he loses the benefit of a composition. *Brookmire et al. v. Bean, Ass.*, 12 N. B. R. 217; 3 Dill. 136; 2 Cent. Law J. 265; Fed. Cas. 1,942.

#### (1) Fraudulent.

59. A composition includes and binds provable debts created by fraud. In *re Shafer et al.*, 17 N. B. R. 116; 1 N. J. Law J. 66; Fed. Cas. 12,895.

60. If the creditor makes it a condition of his uniting in a composition that he shall have any advantage not made known to the others, the transaction cannot stand either at law or in equity. It is a fraud upon creditors. It is treated as oppression towards the debtor, and he may defend against any promise to pay made under such circumstances. *Bean v. Brookmire & Rankin*, 7 N. B. R. 568; 2 Dill. 108; 5 Chi. Leg. News, 814; 2 Amer. Law Rec. 222; 6 Amer. Law T. Rep. 418; 7 West. Jur. 324; Fed. Cas. 1,170.

61. Concerning a composition, the determination of the creditors is final in the absence of fraud, accident or mistake; but where injustice has been done through fraudulent preferences, the maxim must apply, "The law would rather tolerate a private loss than a public evil," and the court will not lend aid to the discharge of the debtor. In *re Jacobs*, 18 N. B. R. 48; Fed. Cas. 7,159. See *ante*, 85.

#### (c) Secured.

62. A creditor of a bankrupt who has personal security will be allowed to vote upon

a resolution of composition the same as if unsecured. In *re Muir et al.*, 13 N. B. R. 72; 6 Biss. 448; 8 Chi. Leg. News, 83; Fed. Cas. 13,196.

63. In the schedule plaintiff's claim was represented as secured. Plaintiff was present at composition proceedings and neither objected nor assented to proceedings. On sale of the property which was security, less than the amount of the debt was realized. It was held that plaintiff was entitled to the percentage agreed upon, at the composition, of his unpaid debt. *Paret v. Ticknor et al.*, 16 N. B. R. 815; 4 Dill. 111; 5 Cent. Law J. 328; Fed. Cas. 10,711.

64. A. was the maker, B. the indorser, and C. the holder of a promissory note. Before maturity of the note B. became bankrupt and entered into a composition with his creditors to pay fifty cents on the dollar. This note was scheduled. A. then became bankrupt and under a composition paid fifty cents on the dollar on the note. B. then offered to pay fifty-five per cent. on the balance due and refused to pay fifty per cent. on the face of the note. It was held that C. was entitled to the double security, and that B., having refused to comply with the terms of the composition, could not be protected by it. *The Nat. M. W. Bank v. Porter et al.*, 17 N. B. R. 329.

65. Creditors who are secured need not be reckoned in computing the proportion who must join in a composition. In *re Van Auker et al.*, 14 N. B. R. 425; Fed. Cas. 16,828.

66. Claimant held notes indorsed by bankrupts. Makers were adjudged bankrupt, and effected composition June 11, 1878, and gave notes payable in three, six and nine months. Claimant refused notes till September 25, 1878, when he accepted cash for matured note and other two notes. On September 9, 1878, he proved claim for amount of original notes. It was held that the proof was correct. In *re Hicks et al.*, 19 N. B. R. 299; Fed. Cas. 6,456.

#### (d) Estoppel.

67. If the other creditors are fully informed of a dispute between debtor and his creditor as to the amount that is actually owing, and of the claims of the respective parties before their final action is taken, they cannot complain if, when called upon to

pay, the debtor insists upon what he claimed. In *re Lissberger*, 18 N. B. R. 230; Fed. Cas. 8,384.

(e) *Lien.*

68. Upon the credit of a vessel, the charterer of it obtained supplies from a material-man, and subsequently went into bankruptcy and a composition was accepted by his creditors. The material-man claimed a lien on the vessel, though he joined in the composition. It was held that his lien was not discharged. The "*Home*," 18 N. B. R. 557; Fed. Cas. 6,657.

69. If a creditor is secured by a lien upon the property of the bankrupt, he may either release such lien and unite in the composition for his whole debt, or have his security valued and come in for the difference. *Id.*

(f) *Set-off.*

70. A creditor who receives a composition from his bankrupt debtor, with full knowledge of all the facts, is not entitled afterwards to have a set-off enforced which he neglected to assert. *Hunt v. Holmes*, 16 N. B. R. 101; Fed. Cas. 6,890.

71. The bankrupt in composition stands, as to set-off, in the position of an assignee, if none has been appointed. In *re North et al.*, 16 N. B. R. 420; 2 Lowell, 487; Fed. Cas. 6,764.

(g) *Commercial Paper.*

72. The holder of a note advanced by a factor to a manufacturer and by him indorsed and discounted, who has agreed to a composition, reserving his right to prove the full amount of the note against the other parties to it, need not, in proving against the manufacturer, give credit for the full amount received by him on the composition, but must abate his proof by giving credit for the amount of the manufacturer's goods in possession of the factor. In *re Cochrane, Jr.*, 16 N. B. R. 432; 2 Lowell, 568; Fed. Cas. 6,109.

73. Certain debtors filed a voluntary petition before the maturity of a note on which they were indorsers. They proposed a composition which was concluded. The note was included in obligations filed, but the holders took no part in the proceedings, but sought to recover the amount of the note, it

having become due after the compromise and not having been paid by the maker. It was held that they could recover. *Smith et al. v. Krauskopf et al.*, 18 N. B. R. 6.

V. COURTS.

See CONTEMPT, 9; COURTS, 74, 263, 265.

(a) *Attachment.*

See ATTACHMENT, 42.

74. A resolution of composition will dissolve an attachment made within four months before the commencement of the proceedings in bankruptcy. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

75. Attaching creditors have no right to participate in a composition meeting. In *re Shields*, 15 N. B. R. 532; 4 Dill 588; 4 Cent. Law J. 557; 24 Pittsb. Leg. J. 190; Fed. Cas. 12,784.

76. When payable under a composition, moneys cannot be reached by attachment or obstructed by proceedings of another court, the object of which is to withhold the fund, pending the litigation, from the creditor entitled to it. In *re Kohlsaat et al.*, 18 N. B. R. 570; Fed. Cas. 7,918.

(b) *Injunction.*

See INJUNCTION, 12, 79.

77. Pending composition proceedings a bankrupt was sued in a state court for a claim scheduled in the bankruptcy court, and was not allowed to plead the composition in bar, though tender had been made in accordance with the composition. An injunction was granted. In *re Shafer et al.*, 17 N. B. R. 116; 1 N. J. Law J. 66; Fed. Cas. 12,695.

78. Creditors who have agreed to a composition will be enjoined from suing on the original debts until such time as was agreed upon for the last payment has passed. The debts to which an injunction can extend are only the debts to which a composition can extend, that is, unsecured debts. In *re Hinsdale*, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,526.

79. One-third of the composition was to be paid April 9, 1877, one-third on May 18, 1877, and one-third on August 18, 1877. Creditors enjoined from suing on the original debts before August 18, 1877. *Id.*

80. A bankrupt filed an answer in a state



court pending composition proceedings and before they could be set up as a defense. The composition perfected, he applied for leave to put in a supplemental answer, which was refused and judgment by default was taken. He then applied for an injunction in the bankruptcy court restraining the enforcement of the judgment. The injunction was refused. In re Nebenzahl, 17 N. B. R. 23; 9 Ben. 243; Fed. Cas. 10,074.

81. A bankrupt had entered into a composition with his creditors. Thereafter, a creditor took judgment against him by default. The debtor applied for an injunction to prevent execution upon the judgment. The application was dismissed. In re Tooker, 14 N. B. R. 35; 8 Ben. 390; 23 Pittsb. Leg. J. 185, 196; Fed. Cas. 14,096.

82. If a composition be entered into for cash, secured by a mortgage on realty, the district court has no jurisdiction to restrain a creditor from levying on personal property, although the name of such creditor was placed on the list of creditors. In re Lytle & Co., 14 N. B. R. 457; 11 Phila. 522; 3 N. Y. Wkly. Dig. 303; 5 Amer. Law Rec. 306; 9 Chi. Leg. News, 18; 33 Leg. Int. 349; 1 Cin. Law Bul. 246; 24 Pittsb. Leg. J. 14; Fed. Cas. 8,650.

83. After filing of petition creditor obtained judgment. A composition having been proposed and confirmed, the collection of the judgment was enjoined. Creditor's debt was included in debtor's statement, but was never proved. Debtors having failed to pay first instalment of composition and second instalment when it was due, creditor applied for dissolution of injunction, and court ordered that same be dissolved unless debtors should forthwith carry out composition or proceed with bankruptcy proceedings. On petition to review it was held that the injunction was properly granted, and that the court was right in refusing to dissolve it. In re Bayly et al., 19 N. B. R. 73; 26 Pittsb. Leg. J. 172; Fed. Cas. 1,144.

#### (c) *Arrest.*

84. A bankrupt was arrested under civil process of a state court after confirmation of a composition in the federal court. Plaintiffs alleged that cause of action was based upon a sale procured by defendant through

false representations. It was held that the composition satisfied the debt. Bamberg et al. v. Stern, 18 N. B. R. 74.

#### (d) *Judgments.*

85. Composition suspends all remedies on a judgment except perhaps those necessary to enforce the liens in existence when the bankruptcy proceedings were commenced. Conover et al. v. Dumahaut et al., 17 N. B. R. 553.

86. A creditor began an action by attachment against his debtor, and immediately a petition in bankruptcy was filed by other creditors. Debtor applied for a composition. Plaintiff obtained judgment. Composition was approved by the court. Plaintiff had notice of the proceedings, but refused to accept payment under the composition. It was held that his attachment was not dissolved by the composition. In re Shields, 15 N. B. R. 532; 24 Pittsb. Leg. J. 190; 4 Dill. 588; 4 Cent. Law J. 557; Fed. Cas. 12,784.

### VI. COMPOSITION MEETINGS.

#### (a) *General.*

87. None but unsecured creditors should be heard on the ratification of a resolution of composition for which due notice was given. In re Scott, Collins & Co., 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

88. Before they are permitted to vote on a resolution of composition creditors must prove their claims, but in involuntary proceedings the petitioning creditors are not bound to prove anew at a meeting for composition. *Id.*

89. In composition proceedings the holder and owner of an accommodation note is the party to be dealt with. The accommodation maker is not entitled to notice of such proceedings involving indorser and payee, for the accommodation of whom the note was paid. Liebke v. Thomas, 116 U. S. 605.

90. When the right of a party to vote at a composition meeting is denied by the register, his course is to ask an adjournment of the meeting until his right as a creditor can be determined by the court before the final vote. In re Spencer, 18 N. B. R. 199; Fed. Cas. 13,229.

91. Only creditors who prove their claims are entitled to take part in the proceedings at a composition meeting. In re Keller et al., 18 N. B. R. 331; Fed. Cas. 7,654.

92. When a debtor has had a meeting of his creditors, and has had his proposition for a settlement passed upon, he should not be permitted to require their attendance at further meetings; but where it appears that the object of the meeting failed, by reason of the failure to instruct the attorneys who represented the creditors, it is proper to direct a meeting for the purpose of again considering the debtor's offer of a composition. In re McDowell et al., 10 N. B. R. 459; 6 Biss. 193; 6 Chi. Leg. News, 413; Fed. Cas. 8,776.

93. Upon the filing of a petition for a composition, the court will direct the register to call a meeting of creditors and issue notices therefor. In re Muir et al., 13 N. B. R. 72; 6 Biss. 448; 8 Chi. Leg. News, 33; Fed. Cas. 13,196.

#### (b) *Voters.*

See VOTE, 15.

94. In composition proceedings a creditor offered to vote without first proving his claim. It was held that he could not. In re Mathers et al., 17 N. B. R. 225; Fed. Cas. 9,274.

95. When the assets are sufficient to pay workmen to the extent of \$50 each, they can only vote on the question whether a resolution of composition shall be adopted to the extent of their respective debts above \$50. In re O'Neil, 14 N. B. R. 210; 2 Lowell, 470; Fed. Cas. 10,528.

96. On motion to vacate composition proceedings, it was held that creditors who have not proved debts cannot take part in composition proceeding, although they have been permitted to intervene in proceedings for adjudication and to act therein. In re Bryce et al., 19 N. B. R. 287; Fed. Cas. 2,009.

97. A creditor who has bought a debt with intent to prevent the adoption of a resolution for composition may vote upon it at the meeting for composition if he have no oppressive motive. In re Morris, 12 N. B. R. 170.

#### (1) *Number Required.*

98. A composition was accepted by the requisite number, the register reporting that the requisite number had acted, even if votes

excepted to by the minority creditors were refused. It was held that it was the duty of the court to examine the objections of the minority fully. In re Keiler, 18 N. B. R. 36; 10 Chi. Leg. News, 299; Fed. Cas. 7,648.

99. Where creditor has given assent in writing and bankrupt has acted upon it and other creditors have given theirs, and assent of requisite number is obtained and filed, a creditor has no absolute right to withdraw on the day fixed for hearing. In re Brent, 8 N. B. R. 444; 2 Dill. 129; Fed. Cas. 1,832.

100. A bankrupt had eighteen creditors, of which number thirteen owned debts valued at more than \$50 and five were for less amounts. The court held that those whose debts exceeded \$50 would be counted in computing the requisite two-thirds who shall confirm a resolution of composition (act of 1867). In re Gilday, 11 N. B. R. 108; 7 Ben. 491; Fed. Cas. 5,422.

101. Where a creditor considers himself and is considered by his debtor as fully secured, although in fact he is not, he is not to be counted as a creditor merely to defeat a composition to which the requisite number of creditors have assented. In re Snelling, 19 N. B. R. 120; Fed. Cas. 13,140.

102. Creditors whose debts do not exceed \$50 are to be disregarded in computing the majority who must pass a resolution of composition, as well as in the number of those who are required to sign the confirmatory statement (act of 1867). In re Wald et al., 12 N. B. R. 491; 1 N. Y. Wkly. Dig. 174; 7 Chi. Leg. News, 26; 1 Cent. Law J. 531; Fed. Cas. 17,054.

#### (c) *Examination of Bankrupt.*

103. On exceptions to resolutions for composition, it was held that it is a right of a small minority of creditors present at a composition meeting to insist upon opportunity for examination of bankrupt before vote is taken, but such right is waived by moving for vote before such examination. In re Little, 19 N. B. R. 234; 2 N. J. Law J. 211; Fed. Cas. 8,392.

104. Leave to record a resolution of composition was refused, where at the meeting in composition the right of a creditor to make inquiries of the debtor was postponed against his will until after the resolution was voted upon. In re Morris, 11 N. B. R. 443.

105. Suitable inquiries may be made of the debtor at a composition meeting by any creditor authorized to vote at such meeting. *Id.*

106. A motion for confirmation of a composition was opposed by two creditors on the ground that at the first meeting one of the debtors was excused from examination by vote of the creditors. It was held that the objection was frivolous. *In re Wilson et al.*, 18 N. B. R. 300; Fed. Cas. 17,785.

107. The debtor must appear in person, or by representative, at the creditors' first meeting and submit the required statement, but he is not bound to appear at the hearing to submit anew the statement previously made. *In re Scott, Collins & Co.*, 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

#### (d) *Resolution.*

108. The confirmatory signatures are essential to make the resolution operative, and they need not be attached at the creditors' meeting, but must have been at or before the hearing. *In re Scott, Collins & Co.*, 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

109. It is not necessary to hold a second meeting of creditors to confirm the original resolution of composition. *Id.*

110. Objection was made by creditors that expenses of attachments of the debtor's property were not provided for by the resolution for composition. There had been no first meeting of creditors and no assignee. The resolution for composition was therefore ordered recorded. *In re Clapp & Co.*, 14 N. B. R. 191; 2 Lowell, 468; Fed. Cas. 2,783.

111. A resolution cannot be recorded where the statement of assets and of debts shows that the requisite proportion of creditors have not confirmed it, although the statement is inaccurate. A statement of debts and assets can be corrected only at a meeting of creditors. *In re Asten et al.*, 14 N. B. R. 7; 8 Ben. 350; Fed. Cas. 594.

112. No further recording of a resolution of composition is necessary than to record the decree containing the resolution. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

113. A composition resolution provided that the property of the bankrupt, held by

the voluntary assignee, should be returned to him. The court held that creditors bound by the composition will not be permitted to undo what was done if the transfer is made in furtherance of the resolution. *In re Rodgers et al.*, 18 N. B. R. 381; Fed. Cas. 11,992.

114. It must appear wrong has been done to the minority creditors by the vote on a composition before the court will interfere. *In re Wronkow et al.*, 18 N. B. R. 81; 26 Pittsb. Leg. J. 2; 15 Blatchf. 38; Fed. Cas. 18,103.

115. Resolution proposed composition to be paid within thirty days upon condition that all property of bankrupt be surrendered and all pending suits discontinued. It was held not improper. *In re Cavan et al.*, 19 N. B. R. 303; Fed. Cas. 2528.

116. Where a partnership petitions for a composition, the vote upon the resolution may be taken generally, or upon demand the vote of the individual and of the partnership creditors will be taken separately. *In re Spades*, *In re Muir et al.*, 13 N. B. R. 72; 6 Biss. 448; 8 Chi. Leg. News, 33; Fed. Cas. 13,196.

117. In order to lay a foundation for the action of the creditors in accepting or rejecting a composition and to inform them what they were asked to accept, it is not required that there should be a written proposition from the bankrupt preceding the notice to creditors. *In re Haskell*, 11 N. B. R. 164; 1 Cent. Law J. 531; Fed. Cas. 6,192.

118. A creditor is not bound to accede to a compromise, nor is he censurable because he refuses to unite with others, or if his refusal proceeds from a want of confidence in the debtor. *Bean v. Brookmire et al.*, 7 N. B. R. 568; 2 Dill. 108; 5 Chi. Leg. News, 314; 2 Amer. Law Rec. 222; 6 Amer. Law T. Rep. 418; 7 West. Jur. 324; Fed. Cas. 1,170.

119. The form of oath prescribed for proving debts in bankruptcy need not be followed in voting upon resolutions for composition. *In re Morris*, 12 N. B. R. 170.

## VII. DEFERRED PAYMENTS.

### (a) *General.*

120. A secret agreement between the debtor and a creditor, that, in consideration of the latter's signing the composition deed,

his composition note shall be immediately discounted in cash, is void, and the amount can be recovered by the assignee with costs, whether such creditor signed first or last, and although the amount received was less than he was entitled to under the composition. *Bean v. Amsink*, 8 N. B. R. 228; 10 Blatchf. 861; Fed. Cas. 1,167.

121. A composition will not be avoided, *ipso facto*, by a delay in the payment of the composition notes, where the delay is occasioned by legal or other difficulties; and a failure to pay one of the creditors will not work a forfeiture of the rights of the bankrupt as to the creditors who have received payment. In *re Kohlsaat et al.*, 18 N. B. R. 570; Fed. Cas. 7,918.

122. Bankrupt tendered money and notes according to the terms of the composition, but the creditors refused to take them. It was held that the court had no power to imprison for contempt. In *re Hinsdale*, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,526.

123. The decision of the district court that a resolution which provides for payment in notes is valid is conclusive in a collateral action. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

124. The holder of a note given for a deferred payment in a composition settlement, who does not appear to receive payment in pursuance of notice to creditors, is entitled, upon subsequent demand and refusal, to a summary order for payment. In *re Reynolds*, 16 N. B. R. 176; 5 N. Y. Wkly. Dig. 51; Fed. Cas. 11,725.

125. A composition was accepted providing for payment in secured six-months notes. One creditor filed a petition for review of the order of the district court directing the composition to be recorded, on the ground that it did not provide for payment in money. It was held that the composition was valid. In *re Hurst*, 18 N. B. R. 455; 1 Flip. 462; 8 Chi. Leg. News, 147; 3 Cent. Law J. 78; Fed. Cas. 6,925.

126. Unless the amount agreed upon is actually paid the composition will not discharge the debtor. *Id.*

127. Composition notes are given as evidence of a security for the instalments, and the composition is payable in money although payment is postponed to a future day. In *re*

*The McNab & Harlin Mfg. Co.*, 18 N. B. R. 388; 21 Pittsb. Leg. J. 88; Fed. Cas. 8,906.

128. The holder of a note given for a deferred payment in a composition which falls due pending the hearing of a petition for a review of the composition, who does not appear to receive payment in pursuance of notice to creditors, is entitled, upon subsequent refusal, to an order for payment. In *re Reynolds*, 16 N. B. R. 176; 5 N. Y. Wkly. Dig. 51; Fed. Cas. 11,725.

129. One-third of the composition was to be paid April 9, 1877, one-third May 18, 1877, and one-third August 18, 1877. Creditors were enjoined from suing on the original debts before August 18, 1877. In *re Hinsdale*, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,526.

### (b) *Security for.*

130. A creditor proved his claim, voted upon the resolution of composition, and accepted his share in money and promissory notes given in pursuance of said resolution to secure payment of future instalments. It was held that he could not recover his debt through the state courts, although default was made in payment of the notes. *Deford et al. v. Hewlett*, 18 N. B. R. 518.

131. A resolution of composition, which provides that the payment shall be guaranteed by a satisfactory bond to a committee of creditors, may be confirmed. In *re Lewis et al.*, 14 N. B. R. 144; Fed. Cas. 8,314.

132. A composition which provides for payment in indorsed notes is fatally defective. In *re Langdon*, 18 N. B. R. 60; 2 Lowell, 387; 1 N. Y. Wkly. Dig. 365; Fed. Cas. 8,058.

133. A composition was accepted providing for payment in secured six-months notes. One creditor filed a petition for review of the order of the district court directing the composition to be recorded, on the ground that it did not provide for payment in money. *Held*, that the composition could be confirmed. In *re Hurst*, 18 N. B. R. 455; 1 Flip. 462; 8 Chi. Leg. News, 147; 3 Cent. Law J. 78; Fed. Cas. 6,925.

134. In case of a composition where indorsed notes are given as security for postponed payments, a bankrupt is not entitled to his discharge until the whole amount of

the notes is actually paid. In *re Reiman et al.*, 13 N. B. R. 128; 12 Blatchf. 562; Fed. Cas. 11,675.

135. A resolution of composition which provides for payment in instalments, the postponed payments being secured by indorsed notes, complies with the statute requiring payment "in money." *Id.*

136. A provision in the bankrupt act that composition deeds "shall subject, etc., provide for a *pro rata* payment in money," is not violated when a composition provides for payment by instalments, the deferred payments being secured by notes satisfactorily indorsed. *Id.*

137. It does not invalidate a composition that, in addition to be paid in deferred payments, real estate of the bankrupt is to remain with the assignee to be converted into money for the use of the creditors. In *re Wronkow et al.*, 18 N. B. R. 81; 15 Blatchf. 88; 26 Pittsb. Leg. J. 2; Fed. Cas. 18,105.

138. A composition was accepted at twenty-five cents on the dollar, five cents to be paid in five days and the balance in deferred payments, the property to revert to the debtors upon payment of the five cents. Objection was made that the deferred payments were not secured, that the debtors were not to be trusted, and the creditors had no assurance that they would be paid. Objection was sustained. In *re Block et al.*, 18 N. B. R. 328; Fed. Cas. 1,551.

139. A composition providing for deferred payments was assented to by the requisite number of creditors. The last payment was to be made three years from date of confirmation. Upon giving of the notes the property was to be surrendered. Although the president and treasurer of the bankrupt was a defaulter, the trustees continued him in office as president, and took no steps to punish him. It was held, on motion for confirmation, that the corporation was not of such a character that it would be reasonably safe to trust it for three years with the property. Confirmation refused. In *re The McNab & Harlin Mfg. Co.*, 18 N. B. R. 388; 21 Pittsb. Leg. J. 88; Fed. Cas. 8,906.

141. Creditors who have received more than their per centum according to the composition, without the knowledge of the other creditors, may nevertheless bring an action on the original obligation where the compo-

sition was fraudulently obtained. *Elfelt v. Snow*, 6 N. B. R. 57; 2 Sawy. 94; Fed. Cas. 4,342.

## VIII. REVIVAL OF DEBT.

142. A debt released by a composition is not revived by the subsequent payment in full of other old debts, although the complaining creditor consented to the composition with an understanding "that none of the other creditors should receive better terms." In *re Sturgis et al.*, 16 N. B. R. 804; 8 Biss. 79; 10 Chi. Leg. News, 88; Fed. Cas. 13,565.

## IX. GENERAL ASSIGNMENT.

See ASSIGNMENTS, 29, 62.

143. A composition was effected which provided that upon delivery of the composition notes the property of the debtors in the hands of a voluntary assignee should be delivered to the bankrupts. It was held that such provision was nugatory as to the responsibility of the assignee or the rights of creditors under the assignment, except as they are affected by the confirmation of the composition and by payment under the composition. In *re Hyman et al.*, 18 N. B. R. 299; Fed. Cas. 6,985.

144. Bankrupt filed a voluntary petition after having made an assignment. It was held that court could give effect to composition in case of voluntary bankruptcy, although bankrupt had forfeited his right to a discharge. In *re Troth*, 19 N. B. R. 253; 2 N. J. Law J. 147; 86 Leg. Int. 158; Fed. Cas. 14,188; R. S. 5110.

## X. DISCHARGE.

See DISCHARGE, 80.

### (a) *General.*

145. Where there is no defect in the proceedings for a composition, the admission of a discharge does not prejudice the opposite party. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

146. It is not intended by the statute that no debtor can compound with his creditors, under the amended bankrupt act, who would not be able to obtain his discharge. In *re Haskell*, 11 N. B. R. 164; 1 Cent. Law J. 531; Fed. Cas. 6,193.

(b) *Disposition of Assets.*

147. A final order in composition is not final disposition of bankruptcy proceedings, and does not place at disposal of bankrupt moneys belonging to estate held by sheriff subject to further order of court. In re Mickel et al., 19 N. B. R. 374; Fed. Cas. 9,529.

148. A composition was effected providing that upon payment of the composition notes the property of the bankrupt, in the possession of an assignee under a voluntary assignment, should be restored to the debtor. Payment of the composition was made and debtor applied to the court to enforce the terms of the composition. It was held that the court had no power to determine questions of title between the debtor and persons not parties to the proceedings. In re Waitzfelder et al., 18 N. B. R. 260; Fed. Cas. 17,048.

149. If no provision is made in a composition deed for disposition of a debtor's property, the same shall be construed as an intent that the debtor shall retain the same, subject only to the power given the court to enforce the provisions of the composition. In re Reiman et al., 11 N. B. R. 21; 7 Ben. 455; Fed. Cas. 11,673.

(c) *Effect of.*

150. A composition is a compromise of a debtor with his creditors carried on under the supervision of the court. It absolutely discharges the debts of those creditors whose names, addresses and debts are placed in the statement produced at the meeting of creditors, and no other discharge is needed. In re Becket, 12 N. B. R. 201; 2 Woods, 173; 7 Chi. Leg. News, 243; Fed. Cas. 1,210.

151. A discharge by virtue of compliance with the terms of composition is a discharge by operation of law. In re Merriman's Estate, 18 N. B. R. 411; 44 Conn. 587; 26 Pittsb. Leg. J. 120; Fed. Cas. 9,479.

152. Where the composition provides that the proceedings may be discontinued at any time without notice to the creditors, such provision is only a waiver of notice of an application to discontinue, and the court is not bound to grant the application. In re The McNab & Harlin Mfg. Co., 18 N. B. R. 388; 21 Pittsb. Leg. J. 88; Fed. Cas. 8,906.

(d) *From Debts.*

153. A composition does not discharge the petitioner from his debts until the composition notes are paid, and a creditor can sue for the original debt if his notes are not paid, and he is entitled to a *pro rata* share under general assignment. In re Leipziger, 18 N. B. R. 264.

154. A composition with creditors in a case ratified by order of the district court under the act of 1874 does not discharge a debt growing out of a fiduciary relation. Bailey v. University, 106 U. S. 11.

155. Composition between creditors and bankrupt under the act of 1874 is a proceeding in bankruptcy, and debts created by fraud will not be discharged under it. Wilmot v. Mudge, 103 U. S. 217.

156. The inability of the debtor to obtain a discharge by order of the court does not preclude his obtaining satisfaction of his debts by composition. In re Weber F. Co., 13 N. B. R. 529; Fed. Cas. 17,330.

157. A debt created by fraud is discharged by a composition in which creditor participates. Wells v. Lamprey, 16 N. B. R. 205.

158. If a resolution of composition has been ratified, it confines the secured creditor to his security and discharges the debtor from personal liability for the secured debt. In re Lytle & Co., 14 N. B. R. 457; 11 Phila. 522; 3 N. Y. Wkly. Dig. 303; 5 Amer. Law Rec. 306; 9 Chi. Leg. News, 18; 33 Leg. Int. 349; 1 Cin. Law Bul. 246; 24 Pittsb. Leg. J. 14; Fed. Cas. 8,650. See *ante*, 9, 50.

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CONCEALMENT.

See ACTS OF BANKRUPTCY; BONA FIDE TRANSFER, 4; DISCHARGE, 182, 183; EVIDENCE, 127; FRAUD, IX.

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CONFESSIONS.

See JUDGMENT, III, V, VI; PREFERENCES, IX, (a).

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CONFESSION OF JUDGMENT.

See JUDGMENTS; PREFERENCES.

## CONFLICT OF LAWS.

## I. UNITED STATES AND STATE LAWS.

## II. JURISDICTION.

## III. STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF, 27; SALE, 53;  
STATE LAWS, 4, 6, 11.

## I. UNITED STATES AND STATE LAWS.

1. Where an assignee under state law has turned over the estate to the assignee in bankruptcy, the bankrupt law, and not the state law, governs. In re Bousfield, 17 N. B. R. 153; Fed. Cas. 1,704.

2. The state laws are not entirely superseded by the bankruptcy act, but where there is no conflict the former remain in force. Gerry's Appeal, 17 N. B. R. 196.

3. The provisions of the Massachusetts insolvent law are substantially similar to section 36 of the act of 1867. Held, that the bankrupt court is not bound by the decisions of the supreme court of that state. In re Knight, 8 N. B. R. 436; 2 Biss. 518; 18 Int. Rev. Rec. 166; 30 Leg. Int. 338; 21 Pittsb. Leg. J. 48; Fed. Cas. 7,880.

4. A sheriff attached the property of a debtor, who upon the same day lodged with the probate court a deed of assignment under the insolvent laws of the state, and the assignee in bankruptcy claimed the property. Held, judgment for plaintiff, the state insolvent law not being repealed by the United States bankruptcy law of 1867. Maltbie v. Hotchkiss, 5 N. B. R. 485.

5. On the taking effect of the general bankrupt law of the United States, June 1, 1867, the law of the state of Louisiana approved March 14, 1842, providing for the liquidation of banks, was superseded. Thornhill v. Bank of Louisiana, 5 N. B. R. 367; 1 Woods, 1; Fed. Cas. 13,992.

6. The authority to set aside a discharge in bankruptcy, conferred upon the federal court by the bankrupt law, is incompatible with the exercise of the same power by a state court and the former is paramount. Alston v. Robinett, 9 N. B. R. 74.

7. When a debtor is adjudged a bankrupt, all proceedings against him in a state court must stop, if the subject-matter can be proven against his estate in bankruptcy; and no

creditor who holds a claim against the estate, which might be proven in bankruptcy, whether the debt is secured or not, can enforce such debt in a state court, except by the permission of the district court. In re Winn, 1 N. B. R. 131; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

8. A depositor of a savings bank brought suit against the bank for his deposits. The bank pleaded that under a state law the court had cut down the amount due to each depositor *pro rata*, thus apportioning a loss suffered by the bank. The law provided for reduction when the assets should fall below ninety per cent. of the deposits. Held, that such law was not void because the national bankrupt law was in force when it was enacted. Simpson v. Bank, 15 N. B. R. 385.

9. The object of the bankrupt law is to place the administration of the assets of a bankrupt within the control of the bankrupt court, and the passage of the law suspended all state insolvent laws. In re Citizens' Sav. Bank, 9 N. B. R. 152; Fed. Cas. 2,735.

10. The general bankruptcy law suspends all proceedings under state insolvent laws. In re Merchant Ins. Co., 6 N. B. R. 43; 3 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

11. The bankrupt law supersedes a state law which provides for the distribution of the assets of an insolvent bank. Shryock et al., Ass., v. Bashore, 13 N. B. R. 481; Fed. Cas. 12,820.

12. A bankrupt petitioned for the benefit of the state insolvent law after the passage of the United States bankrupt law. Held, that state law was suspended in so far as the provisions of the bankrupt law cover the subject-matter of the state insolvent law. In re Reynolds, 9 N. B. R. 50; Fed. Cas. 11,723.

13. As between the assignee in bankruptcy and a receiver in a creditor's suit, though first appointed, the former has the better right to money awarded to the bankrupt debtor by United States commissioners on a claim against a foreign government. Booth v. Clark, 17 How. 322.

## II. JURISDICTION.

14. The bankrupt laws do not *ipso facto* suspend state laws for the collection of debts,

and the jurisdiction conferred upon courts of bankruptcy in this respect is superior but not exclusive to the state laws. *Chandler, Rec., et al. v. Siddle*, 10 N. B. R. 236; 3 Dill. 477; 1 Cent. Law J. 341; Fed. Cas. 2,594.

15. Where an assignee under a state law has turned over the estate to the assignee in bankruptcy, the bankrupt law and not the state law governs. In *re Bousfield et al.*, 17 N. B. R. 153; Fed. Cas. 1,704.

16. A debtor made an assignment under the insolvent law of Ohio on May 25, 1867, and under it a state court took cognizance of the matter. On July 17 a petition in bankruptcy was filed by a creditor. It was held that as to this matter the bankrupt act of 1867 was in force on May 25, and the United States court could rightfully take jurisdiction of the whole matter. In *re Langley*, 1 N. B. R. 155.

17. A voluntary assignment by a debtor, under the insolvent laws of the state of Connecticut, no proceedings having been instituted under the bankrupt act, is not void, although such act is applicable to the case at the time of the assignment. But in case of an actual conflict of jurisdiction, the state law must yield to the national. *Maltbie v. Hotchkiss*, 5 N. B. R. 485.

18. Where acts are done by state courts in the proper exercise of their jurisdiction, which do not conflict with the jurisdiction of federal courts, such acts bind the federal courts. In *re Keiler et al.*, 18 N. B. R. 10; Fed. Cas. 7,347.

19. Proceedings in bankruptcy were begun against a debtor in two different district courts. *Held*, proper proceeding is to *stay*, not *dismiss*, second. In *re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; Fed. Cas. 1,677.

20. The bankruptcy court has the power to restrain the sheriff of the state court from levying on the property of the bankrupt to satisfy a judgment of the latter court, although judgment was obtained prior to the adjudication in bankruptcy. In *re Mallory*, 6 N. B. R. 22; 1 Sawy. 88; Fed. Cas. 8,991.

21. Receivers of a corporation declared insolvent under state laws claimed the right to administer the assets as against the bankruptcy courts. *Held*, the United States bankruptcy courts could take as against them.

In *re Independent Ins. Co.*, 6 N. B. R. 260; *Holmes*, 103; Fed. Cas. 7,017.

22. A bankruptcy court issued an injunction to prevent the sale of a debtor's land under a judgment by the state court. On motion to dissolve upon the ground that the court could not restrain the sale, the motion to dissolve was denied. In *re Lady B. M. Co.*, 6 N. B. R. 252; Fed. Cas. 7,980.

23. A trustee in April, 1874, brought suit in a state court to recover realty claimed to be fraudulently conveyed. The proceedings were stayed for some time, the plaintiff giving security for costs. In the interim the Revised Statutes came into force. It was then held on demurrer that the state court was thereby deprived of jurisdiction. *Frost v. Hotchkiss*, 14 N. B. R. 443.

### III. STATUTE OF LIMITATIONS.

24. The question was certified to the court as to whether a debt barred by the statute of limitations of Massachusetts, where the bankrupt had resided for ten years, but not barred by the statute of limitations of Vermont, where the creditor resided and where the contracts were made, could be proved against the bankrupt, and, if not, whether the act of the bankrupt in entering the debt upon his schedule revived the same. Both questions were answered in the negative. In *re Kingsley*, 1 N. B. R. 66; 1 Lowell, 216; 7 Amer. Law Reg. (N. S.) 423; 15 Pittsb. Leg. J. 235, 277; Fed. Cas. 7,819.

25. The petitioner in involuntary bankruptcy claimed to be a creditor by reason of a claim which was barred by the statute of limitations, and that the bankrupt court was not bound by the state statute. *Held*, petition dismissed. In *re Cornwell*, 6 N. B. R. 305; 9 Blatchf. 114; 6 Amer. Law Rev. 365; Fed. Cas. 3,250.

### CONFUSION OF GOODS.

Where a bailee, prior to his bankruptcy, mixes the property bailed (wheat) with his own so that the identical property cannot be distinguished, the bailor can only prove as a general creditor and share *pro rata* against the estate in bankruptcy. *Adams v. Meyers*, 8 N. B. R. 214; 1 Sawy. 306; Fed. Cas. 62.



**CONGRESS.**

See CONSTITUTIONAL LAW; CONTRACTS, VI.

**CONSIDERATION.**

See CLAIMS; COMMERCIAL PAPER, 19, VII; CONVEYANCES, V, (c); FRAUD, 50, 69; MARRIED WOMAN, 5; MORTGAGE, 16; PARTNERS, 148.

**CONSTRUCTION.**

See STATUTORY CONSTRUCTION.

**CONSTITUTIONAL LAW.****I. UNIFORMITY.**

- (a) *Uniform Bankrupt Laws.*
- (b) *Void if Not Uniform.*
- (c) *Uniformity Not Destroyed.*

**II. EXEMPTION.****III. IMPAIRING THE OBLIGATIONS OF CONTRACT.****IV. LAWS AFFECTING THE REMEDY.****V. IN GENERAL.**

See CONTRACTS, VI; COURTS, II, (e); EXEMPTION, 1, 21, 26; PETITION, 139; STATUTORY CONSTRUCTION, 79.

**I. UNIFORMITY.****(a) *Uniform Bankrupt Laws.***

1. The constitutional grant of power to congress to establish uniform laws on the subject of bankruptcy gives congress plenary power over the subject of bankruptcy under one limitation only—that the laws passed upon that subject shall be uniform throughout the United States. In re Silverman, 4 N. B. R. 173; 13 Int. Rev. Rec. 52; Fed. Cas. 12,855; In re Reiman et al., 11 N. B. R. 21; 7 Ben. 455; Fed. Cas. 11,873.

2. Congress possessed the power to establish uniform laws on the subject of bankruptcies throughout the United States, and congress, pursuant to that power as conferred in the constitution, on the 2d day of March, 1867, passed an act to establish such a uniform system. Shearman v. Bingham et al., 7 N. B. R. 490; Safe Deposit & Savings Inst., 7 N. B. R. 398; Fed. Cas. 12,211.

3. The provision in the constitution on the

subject, the passage of uniform bankrupt laws (art. 1, sec. 8), includes the power to legislate upon insolvency. In re Reynolds, 9 N. B. R. 50; Fed. Cas. 11,723.

4. A bankrupt law to be constitutional must be uniform, and whatever rules it prescribes must apply to all. In re Daniel Deckert, 10 N. B. R. 1; 3 Amer. Law Rec. 96; 1 Cent. Law J. 316, 320; 6 Chi. Leg. News, 310; 1 Amer. Law T. Rep. (N. S.) 336; 13 Amer. Law Rec. 786; Fed. Cas. 3,728.

5. When the legislative power conferred upon congress by the constitution to "establish uniform laws upon the subject of bankruptcies throughout the United States" has been exercised it is paramount and exclusive, and suspends the operation of the insolvency laws of a state; and the fact that the assets of an insolvent are not sufficient to pay fifty per cent. of his debts, and that a majority of his creditors will not otherwise consent to his discharge, does not remove a case from the operation of the act (1867). Nostrand v. Barr, 2 N. B. R. 154.

6. When congress had called into exercise the clear constitutional grant of power to pass a uniform bankrupt law, the jurisdiction and legislation of the state as to the settlement of insolvent estates was wholly suspended, to be resumed only when the national law ceased to be in force. In re Langley, 1 N. B. R. 155.

**(b) *Void if Not Uniform.***

7. Unless a bankrupt law is uniform it is void. In re Duerson, 13 N. B. R. 133; Fed. Cas. 4,117.

8. A law which provides for one state rules different from those prescribed for another cannot be uniform. Id.

9. The questions, "Is the bankrupt law unconstitutional because not uniform?" and "Can the bankrupt law have a retrospective effect without impairing the obligation of contracts?" were referred by the register for decision. The first was answered in the negative and the second in the affirmative. In re Jordan, 8 N. B. R. 180; 5 Leg. Op. 169; 30 Leg. Int. 296; Fed. Cas. 7,514.

10. The amendment to the bankrupt act of March 3, 1873, is unconstitutional because it destroys the uniformity of the act as required by article 1, section 8, of the United

States constitution. In re Daniel Deckert, 10 N. B. R. 1; 3 Amer. Law Rec. 96; 1 Cent. Law J. 316, 320; 6 Chi. Leg. News, 310; 1 Amer. Law T. Rep. (N. S.) 336; 13 Amer. Law Rev. 786; Fed. Cas. 3,728. See also In re Dillard, 9 N. B. R. 8; 2 Hughes, 190; Fed. Cas. 3,912. *Contra*, Kean & White, 8 N. B. R. 367; 2 Hughes, 322; Fed. Cas. 7,630; In re Everitt, 9 N. B. R. 90; Fed. Cas. 4,579.

### (c) *Uniformity Not Destroyed.*

11. The provisions of section 14 of the bankrupt act of 1867, adopting the exemptions in favor of execution debtors established by the law of the several states, does not destroy the uniformity of the bankrupt act, nor violate any provisions of the federal constitution. In re Beckerford, 4 N. B. R. 59; 10 Amer. Law Reg. (N. S.) 57; 4 Amer. Law T. 14; 1 Amer. Law T. Rep. Bankr. 241; Fed. Cas. 1,209.

12. The bankrupt act is not unconstitutional for want of uniformity on account of the diversity of exemptions allowed by the different states, nor is the act of March 3, 1878, unconstitutional in that it displaces liens created by judgments and decrees rendered in state courts. In re Smith, 8 N. B. R. 401; 6 Chi. Leg. News, 33; Fed. Cas. 12,986.

13. It is not requisite to the constitutionality of a bankrupt act that it provide for the discharge of all persons' subject to its provisions. In re Cal. Pac. R. R. Co., 11 N. B. R. 193; 3 Sawy. 240; 2 Cent. Law J. 79; Fed. Cas. 2,315.

14. The fact that the bankrupt act subjects to its operation persons other than merchants and traders does not make it unconstitutional. *Id.*

15. Although the amendment to the forty-third section of the bankrupt act of 1867 allowing composition with creditors fails to require a *pro rata* distribution of the estate of a bankrupt, it is not therefore unconstitutional. In re Reiman et al., 11 N. B. R. 21; 7 Ben. 455; Fed. Cas. 11,673.

## II. EXEMPTION.

16. The provision in the bankrupt act allowing the exemption given by the state laws, whether they are valid or not, is constitutional. In re Smith, 14 N. B. R. 295;

2 Woods, 458; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 315; 8 Cent. Law J. 386; 3 Amer. Law T. Rep. (N. S.) 335; Fed. Cas. 12,996.

17. Laws exempting reasonable portions of the debtor's property from execution and sale properly relate to the remedy, and are therefore not liable to a constitutional objection. In re Owens, 12 N. B. R. 518; 6 Biss. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; Fed. Cas. 10,632.

18. Congress may pass exemption laws impairing the obligation of contracts. In re Owens, 12 N. B. R. 518; 6 Biss. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; Fed. Cas. 10,632.

19. The amendment of the bankrupt act of March 3, 1873, in respect to exempt property, is constitutional, and the exemptions allowed thereby are valid against debts of the bankrupt, without regard to the time when contracted, whether before or after the amendment, and also against liens by judgment or decree of any state court. In re Jordan, 10 N. B. R. 427; Fed. Cas. 7,515.

20. A provision in the bankruptcy act adopting the exemption laws in force in the several states cannot make valid a state exemption law held unconstitutional by the supreme court of that state. *Bush v. Lester et al.*, 15 N. B. R. 38.

21. The acceptance by congress of a constitution of a state under "an act for the more efficient government of the rebel states" is not an amendment of the bankrupt act (1867) as respects an additional exemption therein provided for. In re McLean, 2 N. B. R. 173; Fed. Cas. 8,878.

22. A statute or provision in a state constitution which increases the amount or value of land to be allowed as a homestead exemption is unconstitutional and void in so far as it affects a judgment recovered prior to the passage or adoption of such statute or constitution. *Gunn v. Barry*, 3 N. B. R. 1; 15 Wall. 610.

## III. IMPAIRING THE OBLIGATION OF CONTRACT.

### See CONTRACTS, VI.

23. The retrospective effect of the bankrupt law, impairing the obligation of contracts, does not render it unconstitutional;

the inhibition to the impairment of contracts not applying to the federal government. In *re Jordan*, 8 N. B. R. 180; 5 Leg. Op. 169; 30 Leg. Int. 296; Fed. Cas. 7,514.

24. A state cannot impair the obligation of contracts, but congress has such power under the constitutional provisions conferring upon the national legislature authority to establish uniform laws on the subject of bankruptcy throughout the United States. In *re Everitt*, 9 N. B. R. 90; Fed. Cas. 4,579.

25. The power expressly given to congress "to establish uniform laws on the subject of bankruptcies throughout the United States" implies the power to impair the obligation of contracts. In *re Smith*, 14 N. B. R. 295; 2 Woods, 458; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 815; 3 Cent. Law J. 386; 3 Amer. Law T. Rep. (N. S.) 335; Fed. Cas. 12,996.

#### IV. REMEDY — LAWS AFFECTING, CONSTITUTIONAL.

26. The United States, or any one of the states, can pass laws to alter or take away the remedy for the enforcement of a contract, although such remedy may be a vested right, it being only necessary that a remedy should be given, though not in fact so good as the one taken away. *Corner v. Miller et al.*, 1 N. B. R. 98.

27. A law affecting the remedy alone, and not operating injuriously, oppressively or unjustly, is not a retroactive law. *Simpson v. Bank*, 15 N. B. R. 385.

#### V. IN GENERAL.

28. The courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. In *re Smith*, 14 N. B. R. 295; 2 Woods, 458; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 815; 3 Cent. Law J. 386; 3 Amer. Law T. Rep. (N. S.) 335; Fed. Cas. 12,996.

29. Express power to regulate commerce among the several states is given to congress, the grant comprehending every species of commercial intercourse. The power is complete, and may be exercised to its utmost extent without limitations other than are presented in the constitution. *Sweatt v. B., H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer.

Law T. 174; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

30. General Order 26 (act of 1867), by providing for a trial of rejected claims on appeal "as to law," fulfills the constitutional requirement of trial by jury. In *re Paddock*, 6 N. B. R. 132; Fed. Cas. 10,657.

31. The act of March 2, 1867, abolishing imprisonment for debt and authorizing such proceedings to be had before a United States commissioner, appointed solely by the president, without the consent of the senate, does not violate the provision of the constitution vesting the judicial power of the United States in officers appointed by the president with the consent of the senate (art. 2, sec. 2, U. S. Const.). In *re Russell v. Thomas*, 10 N. B. R. 14; 10 Phila. 239; 31 Leg. Int. 189; Fed. Cas. 12,162.

32. The power to establish a system of bankruptcy carries with it the power to establish the details of the system if congress shall think proper. *The Six Penny Savings Bank et al. v. Bank*, 10 N. B. R. 399; Fed. Cas. 12,919.

33. The provision of section 44 (act of 1867) which punishes by imprisonment the fraudulent transfer of the debtor's goods, obtained on credit and unpaid for, within three months before proceedings begun, is constitutional. *United States v. Pusey*, 6 N. B. R. 284; Fed. Cas. 16,098.

34. Criminal jurisdiction cannot be conferred upon state courts by an act of congress, and they are not bound to exercise jurisdiction even in civil cases, but they may decline to do so if they see fit, or if the laws of the state forbid it. *Shearman v. Bingham et al.*, 7 N. B. R. 490.

35. The states cannot tax the means or instruments of the United States, nor can congress tax the means or instruments of the state governments. By the word "means" is meant the revenue, taxes and public securities, as applied to both the United States and the several states, the prohibition extending to salaries of executive and judicial officers, members of congress and of state legislatures. *Sweatt v. B., H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer. Law T. 174; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

36. A paper currency emitted by a state, and receivable in discharge of all debts and

taxes due the state and of all salaries and fees of office, etc., and pledging the faith and funds of the state for the redemption of these paper issues, is within the constitutional prohibition. *Craig et al. v. State of Mississippi*, 4 Peters, 410; *In re Milner*, 1 N. B. R. 107.

37. Congress may, within the limits of federal jurisdiction, modify or repeal the existing rules of evidence, and any such modification should not be left to inference, but should be the subject of clear and unambiguous enactment. *In re Hunt*, 2 N. B. R. 166; 1 Chi. Leg. News, 169; Fed. Cas. 6,881.

## CONTEMPT.

### I. BEFORE REFEREE.

### II. BEFORE COURT.

### III. INJUNCTION.

### IV. IN GENERAL.

See COMPOSITION, 122; ESTATES, 179; EVIDENCE, 69, 112; EXAMINATION, 20, 62; LEASE, 9; MORTGAGE, 75; PLEADING AND PRACTICE, 242.

### I. BEFORE REFEREE.

See REFEREE, 54.

1. A register may order the bankrupt to hand over to the custodian of the estate funds in his hands, and failure to obey is a contempt for which an attachment may issue. *In re Speyer*, 6 N. B. R. 255; 42 How. Pr. 397; Fed. Cas. 13,239.

2. On application of attachment of witnesses for contempt for not making answers on examination, *held*, attachment refused because no interrogatories accompanied the commission and no information as to particular inquiry. *In re Glaser*, 2 N. B. R. 129; Fed. Cas. 5,476.

3. A bankrupt cannot be proceeded against for contempt when owing to sickness he is unable to attend a meeting as required by the register. *In re Carpenter*, 1 N. B. R. 51; Fed. Cas. 2,427.

4. Where a witness had been summoned to be examined before a register in bankruptcy, and did appear, and filed objections to his examination, declining to submit to such examination until the questions raised had been decided, the register held that the witness had a right to have the questions de-

cided, and that his declining to be a witness, after his raising the objections, was not an act constituting a contempt of court. *In re Dole*, 7 N. B. R. 588; 7 West. Jur. 629; Fed. Cas. 3,965.

5. On a motion to punish for contempt a bankrupt who had received money from his creditors, after the filing of the petition, *held*, that while a contempt was committed it was purged, inasmuch as the bankrupt turned over to the assignee all of his property and the contempt was not of a wilful character. *In re Hayden*, 7 N. B. R. 192; Fed. Cas. 6,257.

## II. BEFORE COURT.

See COURTS, 137, 138; ATTORNEYS, 15.

6. Where an order is in effect a final judgment for the payment of money, it cannot be enforced by imprisonment upon the theory of contempt. *In re Atlantic M. Ins. Co.*, 17 N. B. R. 368; 9 Ben. 337; Fed. Cas. 629.

7. The jurisdiction of the United States district court is limited by the judiciary act. Where an appeal was called and the plaintiff dismissed it, the counsel for defendant not desiring to proceed, no one can be said to have disobeyed the order of the court, which forbade all proceedings to enforce demands. *In re Hirsch*, 2 N. B. R. 1; 2 Ben. 493; Fed. Cas. 6,529.

8. A debtor against whom a petition in bankruptcy was filed had represented to his creditors previously that he held certain notes. He afterwards swore that he had sold them and spent the money before injunction was served on him. The evidence indicated that he was endeavoring to defraud the creditors. The court held that he must pay over the money or be in contempt. *In re Kempner*, 6 N. B. R. 521; Fed. Cas. 7,689.

9. Bankrupt tendered money and notes according to the terms of the composition, but the creditors refused to take them. It was held that the court had no power to imprison for contempt. *In re Hinsdale*, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,526.

10. In the absence of an injunction a party is not liable for a contempt for selling property under a decree of foreclosure entered before the adjudication, or for entering up a judgment for the deficiency against the bankrupt. *In re Irving et al.*, 14 N. B. R. 289; 8 Ben. 463; 2 N. Y. Wkly. Dig. 500; Fed. Cas. 7,073; R. S. 5024.

### III. INJUNCTIONS.

See INJUNCTION, 89, 51, 52, 59, 74; and *ante*, §§ 8, 10.

11. A creditor who had obtained judgment in a state court and issued execution before his debtor was adjudged bankrupt, was restrained from selling property by an injunction of the United States court. In defiance of this injunction the property was sold. The court held that contempt was committed. In *re Atkinson*, 7 N. B. R. 148; 3 Pittsb. Rep. 423; 5 Amer. Law T. Rep. 820; Fed. Cas. 606.

### IV. IN GENERAL.

12. After discharge has been granted, power to discover assets by means of examination of bankrupt no longer remains, and will not be revived until discharge has been set aside. In *re Jones*, 6 N. B. R. 886; Fed. Cas. 7,449.

13. Injunction under section 40 of the act of 1867 does not extend beyond adjudication. Hence, proceedings to punish parties for contempt in violating injunction after adjudication must be dismissed. In *re Moses*, 6 N. B. R. 181; Fed. Cas. 9,869.

## CONTRACTS.

### I. VALID.

### II. ILLEGAL OR FRAUDULENT.

### III. FOR COMPENSATION.

### IV. EXECUTORY.

### V. TO REFRAIN FROM INSTITUTING PROCEEDINGS.

### VI. IMPAIRMENT.

### VII. IN GENERAL.

See CLAIMS, 127, 268; DISCHARGES, 233, 811; ESTATES, 274; ESTOPPEL, 20; MORTGAGES, 13; PARTNERS, 40; PROOF OF CLAIMS, 8; STATUTORY CONSTRUCTION, 82; STATE LAWS, 16, 20; STOCKHOLDERS, 3, 14, 15.

### I. VALID.

1. A note of a third person, given and received in payment of a debt of another, is a valid contract, and extinguishes the original debt; and a note given by a partner in payment of the debt of a firm, as to such debt

is the note of a third person. In *re Parker et al.*, 19 N. B. R. 340; Fed. Cas. 10,721.

2. Under laws of Indiana convicts may be hired in any number not exceeding one hundred in any one contract. Bankrupt executed four contracts with different sureties for one hundred convicts each. *Held*, that contracts were valid. In *re Southwestern Car Co.*, 19 N. B. R. 404; 9 Biss. 76; Fed. Cas. 13,192.

### II. ILLEGAL OR FRAUDULENT CONTRACTS.

See AGENT, 10; FRAUD, 89.

3. A contract to take stock in a corporation, induced by fraudulent representations, is not void, but voidable at the option of the stockholder. *Farrar v. Walker, Ass.*, 18 N. B. R. 82; 3 Dill. 506, note; 1 N. Y. Wkly. Dig. 229; 2 Cent. Law J. 670; Fed. Cas. 4,679.

4. Two stock brokers proved claims against the estate of a bankrupt, but the assignee moved to expunge the claims, alleging that they were based on void contracts. The evidence showed that the claims arose from contracts for speculation in wheat "margins," and the court held that such contracts were gaming contracts and that the brokers could not prove their claims properly for money advanced for such purposes. The claims were expunged. In *re Green*, 15 N. B. R. 198; 7 Biss. 338; Fed. Cas. 5,751.

5. The secret intention of one of the parties uncommunicated to the other party, not to fulfill his contract, is not enough to make betting upon the market without any expectation of actual performance; it must be mutual and constitute an integral part of the real contract in order to vitiate it. *Clark, Ass. etc., v. Foss et al.*, 17 N. B. R. 261; 7 Biss. 540; 10 Chi. Leg. News, 211; Fed. Cas. 2,852.

6. A contract may be good in part and void for the residue, where the residue is founded in illegality but not *malum in se*. In *re Stowe*, 6 N. B. R. 429; Fed. Cas. 13,513.

7. A contract to do an act forbidden by law is void and cannot be enforced in a court of justice. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

8. Notes given in consideration of a contract which is in violation of the bankrupt law are void. *Clafin et al. v. Torlina et al.*, 11 N. B. R. 521.

### III. FOR COMPENSATION.

9. Where the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition in bankruptcy, but subsequently fulfills the same, unless the contract for payment was contingent upon full performance of the services, the compensation will be apportioned between the assignee and the bankrupt in proportion to the value of the services rendered before and after the bankruptcy. *In re Jones*, 4 N. B. R. 114; Fed. Cas. 7,448.

10. A debtor, afterwards declared bankrupt, employed counsel to prosecute a claim under a contract by which the attorneys should receive a certain amount. The claim was so prosecuted to judgment, but the assignee of the bankrupt had employed other counsel, who procured the substitution of his name as plaintiff under a contract similar to the first as to fees. The debtor was discharged before judgment was obtained on the claim. *Held*, that his counsel were entitled to one-half the recovery. *Maybin v. Raymond, Ass.*, 15 N. B. R. 853; Fed. Cas. 9,338.

11. A. agreed in writing to serve B. for three years at a stipulated salary and for a certain per cent. of profits. A clause in the contract named \$10,000 as liquidated damages for a breach by either party. A. served B. until the latter filed his petition in voluntary bankruptcy. A prior similar contract named the same sum as a penalty. *Held*, that it was a penalty, and that the filing of the petition by B. was such a breach of contract as would allow A. to prove his claim for damages. *Ex parte Pollard*, 17 N. B. R. 228; 2 Lowell, 411; Fed. Cas. 11,252.

### IV. EXECUTORY CONTRACTS.

12. Where an assignment of a claim, from its own nature or that of the subject-matter assigned, does not pass the legal title, it can only be good as an executory contract, and requires the assent of both parties and the support of a consideration. *Williamson et al., Ass., v. Colcord and wife*, 13 N. B. R. 319; 1 Hask. 620; Fed. Cas. 17,752.

13. To authorize a specific performance, a contract should be clear, definite and unequivocal in all its terms. *In re The Jackson*

*Iron Mfg. Co.*, 15 N. B. R. 438; 2 Mich. Lawy. 435; 2 Cin. Law Bul. 154, 157; Fed. Cas. 7,153.

14. A contract to deliver grain in the future is valid, even though the seller has no grain or expectation of having any. *Clark, Ass. etc., v. Foss et al.*, 17 N. B. R. 261; 7 Biss. 540; 10 Chi. Leg. News, 211; Fed. Cas. 2,852.

15. Where a contract is terminated by default of purchaser, the seller being ready to perform, an action will not lie by the purchaser or by his assignee in bankruptcy to recover back the part of the purchase-money paid previous to the default. *Kane, Ass., v. Jenkinson*, 10 N. B. R. 316; Fed. Cas. 7,607.

16. A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same is paid. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

17. One dealing with an agent may resort to the principal to compel the performance of the agreement of the agent, unless the contract was made exclusively on the credit of the agent. *In re Troy Woolen Co.*, 8 N. B. R. 412; Fed. Cas. 14,203.

### V. TO REFRAIN FROM INSTITUTING PROCEEDINGS.

18. The bankrupt act of 1867 did not forbid a creditor to contract with a third party to refrain from instituting proceedings against the debtor. *Ecker v. McAllister*, 17 N. B. R. 42.

19. A contract by a creditor to refrain from instituting bankruptcy proceedings against a debtor is void for want of consideration where for any reason the creditor has no right to institute such proceedings. *Id.*

20. Certain creditors received preferences from an insolvent debtor, and, to prevent other creditors from instituting proceedings in bankruptcy, contracted to pay them a sum of money. Suit was brought on this contract, and, the question of its validity being raised, the court held that creditors could make such a contract. *Berryman v. Allen*, 15 N. B. R. 113.

21. A. contracted that if B. would forbear to institute bankruptcy against C., he (A.) would pay C.'s debt to B. *Held*, that such contract was not forbidden by the bankrupt law; but in this case, the debt being less than \$250, B. had no right to file a petition, and

the consideration for the contract failed. *Ecker v. Bohn*, 16 N. B. R. 544.

## VI. IMPAIRMENT.

See EVIDENCE, 9, 25, III.

22. Congress may pass exemption laws impairing the obligation of contracts. In re Owens, 12 N. B. R. 518; 6 Biss. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; Fed. Cas. 10,632.

23. The power expressly given to congress "to establish uniform laws on the subject of bankruptcies throughout the United States" implies the power to impair the obligation of contracts. In re Smith, 14 N. B. R. 295; 2 Woods, 458; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 815; 8 Cent. Law J. 886; 8 Amer. Law T. Rep. (N. S.) 335; Fed. Cas. 12,996.

24. The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is entered into, are a part of its obligation; and a state may not change them if such change involve the impairment of a substantial right. *Gunn v. Barry*, 8 N. B. R. 1; 15 Wall. 610.

25. So far as a state insolvent or bankrupt law attempts to discharge the contract it is constitutional. *McMillan v. McNeill*, 4 Wheat. 209; *Sturges v. Crowninshield*, 4 id. 122; *Farmers' & Mech. Bank v. Smith*, 6 id. 131.

26. It is immaterial, in the application of this principle, whether the law was passed before or after the debt was contracted. *McMillan v. McNeill*, 4 Wheat. 209.

27. A state bankrupt or insolvent law discharging both the debtor and his further acquisition of property does not impair the obligation of contracts so far as relates to debts contracted subsequent to the passage of such law. Such a law cannot, however, be pleaded in bar of an action brought by a citizen of another state in the United States courts or of any other state than where the discharge was obtained. *Ogden v. Saunders*, 12 Wheat. 218.

28. Since the adoption of the constitution a state has authority to pass a bankrupt law, providing it does not impair the obligations of contracts within the meaning of the constitution, and provided there be no act of congress in force to establish a system of bankruptcy conflicting with such law. *Stur-*

*ges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 218.

29. A state insolvent law which discharges a debtor from liability for debts contracted previous thereto is unconstitutional so far as it attempts to discharge the contract; and it is immaterial that the suit was in a state in which both parties were citizens, where the contract was made, and where they resided until the suit was brought. *Farmers' & Mech. Bank v. Smith*, 6 Wheat. 131.

## VII. IN GENERAL.

30. If a contract is silent as to interest after the time specified for payment of the principal, the creditor is entitled to interest after that time by operation of law and not by any provision of the contract. In re Bartenbach, 11 N. B. R. 61; 2 Amer. Law T. Rep. (N. S.) 33; Fed. Cas. 1,068.

31. A mere promise to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, does not operate as an equitable assignment or give the promisee a lien on such fund. *Ex parte Tremont Nail Co.*, In re Middleboro Shovel Co., 16 N. B. R. 448; Fed. Cas. 14,168.

32. Whether a collateral understanding adverse to a written contract existed is a question for the jury. *Miller, Ass., v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,576.

## CONVEYANCES.

### I. FRAUDULENT.

- (a) *In General.*
- (b) *Before Passage of Act.*
- (c) *Creditor Who May Not Approve.*
- (d) *Effect of Setting Aside.*
- (e) *Proof Sufficient to Invalidate.*
- (f) *Remedy.*
- (g) *Seizure by Marshal.*
- (h) *To Wife or Child.*

### II. NOT FRAUDULENT.

- (a) *In General.*
- (b) *To Wife or Child.*

See BANKRUPT LAWS, 11; COURTS, 85; CRIMES AND OFFENSES, 13; CORPORATIONS, 55; ESTATE, 22, 171, 284; INJUNCTION, 24; LIMITATIONS, STATUTE OF, 8; MORTGAGE, 14,

160; PARTNERS, 108, 110; PLEADING AND PRACTICE, 48, 264; PREFERENCES, 13, 66, 161, 169, 185, 196; REFEREE, 56; SALES, 57, 58, 65; STATE LAWS, 13; TRUSTEE, 54, 193, 195, 196, 199.

### I. FRAUDULENT.

See ACTS OF BANKRUPTCY, 50.

#### (a) *In General.*

1. A fraudulent conveyance, within the meaning of section 29 of the act of 1867, must be a conveyance made as required by section 35, within four or six months before the filing of the petition by or against the debtor. In re Freeman, 4 N. B. R. 17; Fed. Cas. 5,082.

2. Transfers of personal property, consisting of a stock of goods, by an insolvent, take effect only from delivery. Second Nat. Bank v. Hunt, 4 N. B. R. 198; 11 Wall. 391.

3. A deed not at first fraudulent may become so by being concealed, for by its concealment persons may be induced to give credit to the grantor. Barker v. Smith et al., 12 N. B. R. 474; 2 Woods, 87; 2 Amer. Law T. Rep. (N. S.) 386; Fed. Cas. 986.

4. Where a firm executed a chattel mortgage on an unfinished stock, giving the mortgagors, who remained in possession, power to carry on the business in their own name, though as secret agents of the mortgagee, with authority to purchase new materials, and to apply the proceeds to expenses and the remainder, if any, toward payment of debt, *held*, that the mortgage was void as in fraud of creditors. Wait, Ass. etc., v. The Bull's Head Bank, 19 N. B. R. 500; Fed. Cas. 17,043.

5. Mortgages and bills of sale of personal property which are void as to creditors under the statute of frauds of the state where the transactions occur are void and convey no title as against the assignee in bankruptcy. Edmondson v. Hyde, 7 N. B. R. 1; 2 Sawy. 205; Fed. Cas. 4,285.

6. It is *prima facie* evidence of fraud for an insolvent debtor to make a transfer of property outside of the usual course of business. Webb, Ass. v. Sachs et al., 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

7. An attachment was issued against a

debtor by a creditor, but the debtor's partner procured a delay in the levy and purchased the debtor's interest in the business, taking no account of stock, debts or assets. The debtor returned the purchase-money to the purchaser, who placed it in a safe to be drawn out by the debtor as he called for it. The assignee in bankruptcy brought an action to set aside the transfer. *Held*, that both parties were guilty of intending to hinder and delay the creditor. Burrill, Ass. v. Lawry, 18 N. B. R. 367; 11 Chi. Leg. News, 33; 24 Int. Rev. Rec. 342; Fed. Cas. 2,199.

8. A transferred his interest to his co-partner, B, on October 2, on B's promise to pay the firm debts without incurring any new stock or making any effort to continue the business. B filed his petition in bankruptcy October 7. It was held that the transfer was accepted by B in contemplation of filing his petition in bankruptcy, and that the transfer was void as a fraud on the creditors of the partnership. In re Byrne, 1 N. B. R. 122; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; 15 Pittsb. Leg. J. 315; Fed. Cas. 2,270.

9. The fraudulent conveyances mentioned in the bankrupt act of 1867 are those void at common law, or such as are denounced by the state statutes, as distinguished from conveyances in fraud of the bankrupt act. Allen & Co. v. Montgomery et al., 10 N. B. R. 503.

10. A transfer may be attended by such circumstances that the creditor will not be entitled to rely on the false statements of the debtor as to his condition. Bucknam, Ass. v. Goss, 13 N. B. R. 337; 1 Hask. 630; Fed. Cas. 2,097.

11. Suit was brought by the assignee to have declared void a conveyance of all the personal property of the bankrupts. Judgment was rendered for the plaintiff, and on appeal the judgment below was affirmed, as the conveyance did not vest title until within two months of the bankruptcy proceedings, the defendant until that time holding the property in trust to await composition proceedings. Haskill v. Frye, Ass., 14 N. B. R. 525; Fed. Cas. 6,195.

12. A debtor, in failing circumstances, conveyed under a pretense of sale certain lands which it was agreed he should have the use of for one year free of rent with the



privilege, so long as the vendee did not desire to use them himself or sell them, of renting them. *Held*, that such conveyance is fraudulent and void as to creditors. *Lukins v. Aird*, 2 N. B. R. 27; 24 Wall. 78.

13. A transfer of property which is void by the terms of the statute of the state where such transfer is made is also void under the bankrupt law, as the United States supreme court will follow the construction given to such statute by the highest court in the state. *Massey et al. v. Allen*, 7 N. B. R. 401; 17 Wall. 351.

14. T. and W., copartners, being insolvent, made an assignment for the benefit of creditors, but the signature and assent of the assignee were not obtained. Subsequently they made a secret agreement dissolving the firm and transferring the assets to T., who made an assignment. T. and W. having been adjudged bankrupt, the assignment was set aside as in fraud of the bankrupt law. *Held*, that the transaction between T. and W. was invalid as to firm creditors. In *re Tomes et al.*, 19 N. B. R. 86; Fed. Cas. 14,084.

15. The character of the instrument determines the question, and, if its effect is to hinder and delay creditors, it is fraudulent and void. In *re Chamberlain*, 3 N. B. R. 173; Fed. Cas. 2,574.

16. A transfer of property after commencement of the proceedings in bankruptcy is void, although the act of bankruptcy upon which the adjudication was founded was introduced into the petition by an amendment made after such transfer. *International Bank v. Sherman*, 101 U. S. 403.

#### (b) *Before Passage of Act.*

17. Where a debtor, before the passage of the bankrupt act, conveyed his property with intent to defraud creditors, and afterward was adjudged a bankrupt, his assignee may maintain an action to recover the property for the benefit of the creditors. *Bradshaw v. Klein*, 1 N. B. R. 146; 2 Biss. 20; 7 Amer. Law Reg. (N. S.) 501; 1 Amer. Law T. Rep. Bankr. 72; 15 Pittsb. Leg. J. 433; Fed. Cas. 1,790.

18. Under the law of June 1, 1800, providing against fraudulent conveyances made after that date, a deed signed, sealed and delivered May 30th and acknowledged June

14th is held to have been made before the act took effect. *Wood v. Owings*, 1 Cranch, 239.

19. A fraudulent conveyance, made before the passage of the bankrupt act, is not a good ground upon which to oppose a discharge. In *re Rosenfield*, 1 N. B. R. 161; Fed. Cas. 12,058.

20. A fraudulent conveyance made by a debtor anterior to the passage of the bankruptcy statute will not of itself preclude his discharge; but in such case he should not conceal nor attempt to conceal the fraud when he asks the benefit of the statute. In *re Rainsford*, 5 N. B. R. 881; Fed. Cas. 11,587.

#### (c) *Creditor Who May Not Oppose.*

21. It is as well settled in bankruptcy as in equity that one who has become a party to, assented or taken benefit from a fraudulent conveyance, is estopped thereby to claim the same, as a fraud or as an act of bankruptcy. In *re Williams*, 14 N. B. R. 132; Fed. Cas. 17,706.

22. A creditor cannot have set aside a conveyance of real estate, either really or constructively fraudulent, unless he has a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. *Barker v. Smith et al.*, 12 N. B. R. 474; 2 Woods, 87; 2 Amer. Law T. Rep. (N. S.) 886; Fed. Cas. 986.

23. Payments, sales or transfers of any character declared void by the bankrupt law are only void against persons claiming under proceedings in bankruptcy or in the course of administration of a bankrupt's estate, in a court of bankruptcy. *Berryman v. Allen*, 15 N. B. R. 118.

#### (d) *Effect of Setting Aside.*

24. A sale fraudulent under the bankrupt law cannot be annulled by a state court on that ground; but when it is avoided by proceedings in a bankrupt court it is the duty of a state court to enforce the decision. *Bromley v. Goodrich et al.*, 15 N. B. R. 289.

25. If a conveyance of real estate be set aside as intended to defraud creditors, the parties are restored to the status they occupied prior to such conveyance, being entitled to the same legal exemptions and the wife to her dower or homestead rights. *McFar-*

land v. Goodman et al., 11 N. B. R. 184; 6 Biss. 111; 13 Amer. Law Reg. (N. S.) 697; Fed. Cas. 8,789.

26. Where a fraudulent conveyance is set aside by a bankrupt court, the homestead right of the bankrupt remains as if the fraudulent deed had never been made. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

27. A. and wife joined in a deed of their homestead property with the intent to defraud creditors. After bankruptcy proceedings were instituted, the assignee petitioned to set aside the deed and that the property be discharged of the homestead and dower rights of the husband and wife. The deed was set aside. But held that the rights of homestead and dower were not forfeited. *Cox v. Wilder et al.*, 7 N. B. R. 241; 2 Dill. 45; 5 Amer. Law T. Rep. (U. S. Cts.) 500; Fed. Cas. 3,808.

(e) *Proof Sufficient to Invalidate.*

See EVIDENCE, 88.

28. A conveyance made for the purpose of hindering, delaying and defrauding future creditors is fraudulent, even though the grantor be wholly free from debt at the time. *Case v. Phelps*, 5 N. B. R. 452.

29. A voluntary conveyance, where there are no existing debts, may be void as to subsequent creditors if it be shown that the deed was made with an actual intent to defraud such creditors. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

30. To defeat a conveyance for a present consideration, the proof must show that the party to whom or for whose benefit it was made knew or had reasonable cause to believe the grantor insolvent, and that a fraud upon the bankrupt act was intended. The knowledge of a fraud may be established by circumstantial evidence. *Gattman & Co. v. Honea, Ass.*, 12 N. B. R. 493; 7 Chi. Leg. News, 395; Fed. Cas. 5,271.

31. If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence thereof, it is immaterial whether the debtor was or was not solvent after making it. *Sedgwick,*

*Ass. v. Place et al.*, 5 N. B. R. 168; 5 Ben. 184; 3 Chi. Leg. News, 409; 4 Amer. Law T. Rep. (U. S. Cts.) 179; 6 Amer. Law Rev. 181; Fed. Cas. 12,620.

32. A transfer of property out of the ordinary mode, or of unusual character, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. *Walbrun et al. v. Babbitt, Ass.*, 9 N. B. R. 1; 16 Wall. 577.

33. An assignee filed a bill to set aside conveyances made in fraud of creditors, alleging that the deeds were without consideration and were designed to defraud creditors. *Held*, that such allegations are sufficient, and that it is not necessary to charge the circumstances which may conduce to prove the general charge. *Johnson, Ass. etc. v. Helmstaeder et al.*, 19 N. B. R. 71; Bankrupt Law, sec. 14.

34. Though other considerations may also have induced the conveyance, if one motive prompting a conveyance by one member of a firm to the other of his interest is the hindrance of creditors, it is fraudulent at common law, and violates the provisions of the bankrupt act. *Burrill, Ass. v. Lawry*, 18 N. B. R. 367; 11 Chi. Leg. News, 38; 24 Int. Rev. Rec. 342; Fed. Cas. 2,199.

35. It is not necessary, where a voluntary conveyance is sought to be set aside as fraudulent, to prove that the grantee knew of or participated in the fraudulent intent of the grantor. It is sufficient to show that the conveyance was made with a fraudulent intent on the part of the grantor, and that it was voluntary. *Beecher, Ass. v. Clark et al.*, 10 N. B. R. 385; 12 Blatchf. 256; Fed. Cas. 1,223.

36. It was sought to have certain conveyances declared void because in fraud of creditors, without consideration, secret, not actually delivered, and in pursuance of a secret trust. *Held*, that the concealment, etc., evidenced such wrongful intent as to avoid the conveyance. *Id.*

37. If one being in debt make a voluntary conveyance of his entire property, it constitutes fraud. Such rule does not apply to a conveyance by a person free from debt and without reference to future liabilities. If the circumstances clearly show a fraudulent intent, the conveyance is void, as it is when made by one free from debt if with the purpose of committing fraud upon fut-

ure creditors, or if it impair his means so as to hinder his creditors. *Keating v. Keefer*, 5 N. B. R. 183; 4 Amer. Law T. 162; 1 Amer. Law T. Rep. Bankr. 266; Fed. Cas. 7,635.

(f) *Remedy.*

38. The assignee can avoid any conveyance which the creditors could avoid, although made more than six months before bankruptcy. *Pratt v. Curtis*, 6 N. B. R. 139; 2 Lowell, 87; Fed. Cas. 11,875.

39. An assignee is not restricted to an action at law or suit in equity for the recovery of property fraudulently transferred by the bankrupt, but may resort to summary proceedings upon petition to the bankruptcy court. *Bill, Ass. v. Beckwith et al.*, 2 N. B. R. 82; 1 Chi. Leg. News, 103; Fed. Cas. 1,406.

40. The bankrupt need not be made a party to a suit by his assignee to set aside a conveyance made by the bankrupt to the defendant in fraud of creditors. *Buffington v. Harvey, Ass. etc.*, 17 N. B. R. 474; 95 U. S. 99.

41. In an action to set aside a transfer of property made to defraud creditors, the fraudulent holder of the property cannot set up as a defense the debtor's discharge in bankruptcy where the debtor has waived such discharge. *Dewey et al. v. Moyer et al.*, 16 N. B. R. 1.

42. A state court may entertain an action by an assignee to recover property disposed of by the bankrupt in fraud of the bankrupt act. *Dambmann v. White et al.*, 12 N. B. R. 438.

(g) *Seizure by Marshal.*

43. An insolvent firm transferred stock in fraud of the bankrupt act. Thereafter a petition in involuntary bankruptcy was filed and a warrant was issued to the marshal to take possession of the debtor's property, under which warrant he seized the property which had been so transferred. The transfer was held to be void. *Stevenson et al. v. McLaren et al.*, 14 N. B. R. 403.

44. A marshal, under a provisional warrant, is justified in seizing property which the debtor transferred before the commencement of the proceedings by a transfer void under the bankrupt act, and is not liable to the transferee for such seizure. *Id.*

(h) *To Wife or Child.*

See DOWER, 9, 12.

45. Where one commences a settlement on his wife with an honest intent, as by buying a lot, but continues the same project with a fraudulent intent, as by building a house and furnishing it, the whole transaction will be set aside. *Sedgwick v. Place*, 10 N. B. R. 28; 12 Blatchf. 163; Fed. Cas. 12,621.

46. A. engaged in business, made a settlement upon his wife to protect his family in case he became insolvent, and at the time, though not actually insolvent, was weak and unsteady in his pecuniary matters. *Held*, that such conveyance was fraudulent as made with intent to defraud his creditors. *Id.*

47. While insolvent a debtor invested his funds in property and took the conveyances in the name of his wife. He was afterward adjudicated a bankrupt. *Held*, that the state courts had no jurisdiction over a suit of a creditor to set aside the conveyances and appropriate the proceeds to the payment of his debt. The assignee in bankruptcy is a necessary party to the suit, as such rights and interests vest in him. *Winters et al. v. Claitor et al.*, 18 N. B. R. 533.

48. Where the bankrupt filed his petition in May, and the preceding January conveyed certain property to his wife, *held*, that the conveyances were made after his insolvency became known to him, and were therefore fraudulent. In *re Adams*, 3 N. B. R. 139; Fed. Cas. 43.

49. A voluntary conveyance settling property upon the wife and family of the grantor will be considered fraudulent as to subsequent creditors, if the grantor be indebted at the time to such an extent that the settlement will embarrass him in the payment of his debts, although the debts due may be subsequently paid in the course of business. *Antrims v. Kelly et al.*, 4 N. B. R. 189; Fed. Cas. 494.

50. A debtor sold his farm to his father-in-law for a small consideration, who deeded it to the wife for a nominal amount. At this time the debtor believed himself solvent. The wife repeatedly stated that the deeds were burned and creditors were so informed. After his insolvency the deeds were put on record.

The debtor was adjudicated a bankrupt, filed his schedules excluding the farm and received his discharge. The discharge was set aside. *In re Rainsford*, 5 N. B. R. 381; Fed. Cas. 11,537.

51. A debtor, about to engage in a new business, deeded immediately to his wife his hotel business. The deed was not recorded until long afterward, and before such time money was borrowed, the creditor believing the property to be in the debtor, and lending money for such reason. The conveyance was set aside as fraudulent. *Case v. Phelps*, 5 N. B. R. 452.

52. A. confessed judgment in favor of his wife, and executed a conveyance of real estate to B., who reconveyed to A.'s wife, with intent to defraud A.'s creditors; and, being subsequently adjudged bankrupt, one of his creditors filed a bill in equity to which the two-year statutory limitation was interposed. *Held*, that the creditor having proved his debt had the right to file the bill; but that it was filed too late. *Freeland et al. v. Holloman et al.*, 9 N. B. R. 331; Fed. Cas. 5,031.

53. A. and wife separated. He, in consideration of the covenants of herself and trustee, relinquishing all claims of dower and maintenance, deeded to the trustee certain property to secure payment to her of a sum of money. They again lived together, and rescinded the covenants of the deed of separation, but agreed that the settlement should stand. *Held* that, while the original deed was for a valuable consideration, the agreement rescinding the covenants of the settlement left it void as against existing creditors. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill 50; 6 West. Jur. 451; Fed. Cas. 13,071.

54. A. and wife separated, and A., being deeply in debt, agreed to pay C., as trustee, a sum of money as maintenance. Part was paid and part secured by mortgage. Afterward they became reconciled and rescinded the agreement, except as regarded the separate estate. Afterward A. was declared a bankrupt, and, pending proceedings, his property was sold under the mortgage, reserving the right to the parties to proceed against the fund. *Held*, that the consideration having failed, the notes became a voluntary gift, and were in fraud of creditors. *Kehr et al. v. Smith, Ass.*, 10 N. B. R. 49; 20 Wall. 31.

55. A conveyance by a husband, in embarrassed circumstances, of his real estate to trustees for the use of his wife, in consideration of her property which he had converted to his own use, the wife to have no power of disposition during her life, and not by will without consent of the wife being reserved to the grantor and the trustees, is void; and the property so conveyed is liable for the husband's debts existing at the commencement of proceedings in bankruptcy. *Fisher v. Henderson et al.*, 8 N. B. R. 175; Fed. Cas. 4,820.

56. Objection was made to the discharge of a bankrupt, because while insolvent he had conveyed property to his wife. His conveyance was likely to prevent meeting his obligations. Twenty years before his wife had advanced money to him under a verbal promise of repayment and the money had been used to obtain credit in his business. *Held*, that the conveyance was in fraud of creditors. *In re Antisdel*, 18 N. B. R. 289; Fed. Cas. 490.

57. A bill by the assignee to set aside certain voluntary conveyances to a wife or child as in fraud of creditors alleged facts as to antecedent creditors but none as to subsequent. On demurrer, *held*, the conveyances were *prima facie* fraudulent as to existing creditors, and if set aside they would probably become assets for creditors generally. *Pratt v. Curtis*, 6 N. B. R. 139; 2 Lowell, 87; Fed. Cas. 11,375.

58. Where obligations of a firm are met by assuming other obligations which result in bankruptcy, a conveyance by a member of the firm to his wife and children while the first obligations exist, will be set aside as a fraud on subsequent creditors. *Antrims v. Kelly et al.*, 4 N. B. R. 189; Fed. Cas. 494.

59. A voluntary conveyance made by a person not indebted in favor of his wife or children cannot be impeached by subsequent creditors on the ground of being voluntary. It must be shown to have been fraudulent or made with a view to future debts. *Barker v. Smith et al.*, 12 N. B. R. 474; 2 Woods, 87; 2 Amer. Law T. Rep. (N. S.) 386; Fed. Cas. 986.

60. A conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors, and would be a cause of

bankruptcy at the instance of creditors. In re Johann, 4 N. B. R. 143; 2 Bias. 139; Fed. Cas. 7,331.

61. A conveyance by a father to his son may be void as to creditors on account of fraud, but the father is not thus deprived of his right to an exemption out of the property for a homestead. Penny v. Taylor, 10 N. B. R. 200; Fed. Cas. 10,957.

## II. NOT FRAUDULENT.

### (a) *In General.*

62. It is not fraud, under the bankrupt act, for a secured creditor to take goods in fair exchange of his security, though out of the ordinary course of business. Hallack et al. v. Tritch, Ass., 17 N. B. R. 293; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

63. From the provisions of section 35 of the act of 1867, it is manifest that congress intended that the various conveyances therein specified shall be valid unless proceedings in bankruptcy are instituted within six months. Maltbie v. Hotchkiss, 5 N. B. R. 485.

64. A voluntary deed is not fraudulent merely because there is some indebtedness existing, but is void as to existing creditors only when made by a person in such embarrassed circumstances as not to leave ample margin in favor of existing creditors. Smith v. Kehr, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

65. When an advance is made upon an agreement that specific property shall be conveyed, and the same is conveyed within a reasonable time, the advance is to be considered as a present consideration for the conveyance. Gattman & Co. v. Honea, Ass., 12 N. B. R. 498; 7 Chi. Leg. News, 395; Fed. Cas. 5,271.

66. On January 4, R., being indebted to I. R. in the sum of \$2,411, sold to him real estate for the sum of \$10,000. On May 28 a settlement was had in which the said indebtedness was deducted from the amount of the purchase-money and the balance paid in cash. Held, that the payment of the indebtedness was to be considered as having been made at the time of the purchase of the real estate. In re Rosenfeld, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; 8 Amer. Law Reg. (U. S.) 44; Fed. Cas. 12,057.

67. A mortgage or other conveyance made as security for a debt evinced by a note or bond will be upheld as a security for the same continuing debt, though the evidence of it may be changed by renewal or otherwise; but where the security is changed the same will not be. In re Wynne, 4 N. B. R. 5; Chase, 227; Fed. Cas. 18,117.

68. The execution of a contract made before there were circumstances to impeach it as an intended fraud on the bankrupt act, the debtor appearing solvent, will be protected, and a bill by the assignee in bankruptcy to recover property so conveyed will be dismissed. In re Wood, 5 N. B. R. 421; Fed. Cas. 17,937.

69. The removal of a debtor's goods in fulfillment of an existing contract made long before the commencement of bankruptcy proceedings is not fraudulent within the meaning of the bankrupt act, and not sufficient grounds for the appointment of a provisional assignee. M. & M. Nat. Bank of Pittsburgh v. Brady's Bend Iron Co., 5 N. B. R. 419; 19 Pittsb. Leg. J. 5; 3 Chi. Leg. News, 402; 23 Leg. Int. 317; 4 Amer. Law T. Rep. 168; 8 Phila. 171; 3 Pittsb. Rep. 326; 1 Leg. Op. 203; 1 Amer. Law T. Rep. Bankr. 272; Fed. Cas. 9,018.

70. The law will permit a grant or conveyance to take effect upon property when it is brought into existence, and comes to belong to the grantor, in fulfillment of an express agreement, if the agreement be founded on good and valuable consideration, unless it infringe some rule of law or will prejudice the rights of third persons. Barnard et al., Ass., v. Norwich & Worcester R. R. Co. et al., 14 N. B. R. 469; 4 Cliff. 351; 5 Amer. Law Rec. 361; 3 Cent. Law J. 608; 22 Int. Rev. Rec. 312; Fed. Cas. 1,007.

71. A valid conveyance may be made by an assignee of land held by the husband at the time of bankruptcy, without providing for dower interest. Kelly v. Strange, 3 N. B. R. 2; Fed. Cas. 7,676.

72. The assignee in bankruptcy has no greater right than a judgment creditor, and although a sheriff's deed may be given as a mere cover, yet if his grantee convey such property to a *bona fide* purchaser without notice, for value, the deed will be protected. Beall v. Harrell et al., 7 N. B. R. 400; Fed. Cas. 1,163.

73. Cognizance of a transfer *pendente lite* need be taken by litigants in court only where the complainant parts with his interest and where defendant's rights are transferred by death or by operation of law, as by bankruptcy or the insolvent laws. *Sutherland et al. v. Lake Superior S. C. R. R. & Iron Co.*, 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

74. A conveyance by bankrupt shortly before bankruptcy to another person of a house and lot, the title to which stood in his name, though the purchase-money was furnished by such other person, was not void under bankrupt law. *Van Kleeck, Ass., v. Miller*, 19 N. B. R. 484; Fed. Cas. 16,860.

### (b) *To Wife or Child.*

See DOWER, 9, 12; *ante*, § 71.

75. A voluntary settlement in favor of a wife cannot be impeached by subsequent creditors merely because it was voluntary. *Sedgwick, Ass., v. Place et al.*, 5 N. B. R. 168; 5 Ben. 184; 3 Chi. Leg. News, 409; 4 Amer. Law T. Rep. (U. S. Cts.) 179; 6 Amer. Law Rec. 181; Fed. Cas. 12,020.

76. The mere fact that a grantor who makes a deed to a child in consideration of affection is in debt to a small amount will not make such deed fraudulent as against creditors, if the grantor be in prosperous circumstances and the gift be reasonable, and sufficient remain to pay debts. *Id.*

77. The law sanctions a conveyance founded upon the consideration of blood or marriage merely. The legal presumption is that such conveyance is valid. *Id.*

78. A husband out of debt may settle upon his wife such portion of his estate as he pleases, if not done to defraud subsequent creditors. In *re Jones et al.*, 9 N. B. R. 556; 6 Biss. 68; 6 Chi. Leg. News, 271; Fed. Cas. 7,444.

79. A bankrupt when in prosperous circumstances settled property of moderate value on his wife and afterwards extinguished a ground rent on the property. All his debts existing at the time were afterwards paid. *Held*, that the conveyance could not be impeached by the assignee. *Smith et al. v. Vogdes, Ass.*, 13 N. B. R. 433; 92 U. S. 183.

80. A., being in advanced years, conveyed all his property to his daughters, they agreeing to pay all his debts and support him. His property exceeded in value all he owed. *Held*, not in fraud of creditors. In *re Cornwell*, 6 N. B. R. 305; 6 Amer. Law Rev. 365; 9 Blatchf. 114; Fed. Cas. 3,250.

81. A bankrupt, when solvent, conveyed land to his wife, reserving a power of revocation and appointment to other uses. *Held*, that such power does not pass to his assignee in bankruptcy. *Jones, Ass., v. Clifton et al.*, 19 N. B. R. 424; 101 U. S. 225.

82. A bankrupt having agreed with the assignees to sell them his wife's contingent right of dower in the assigned estate, the proceeds to be invested in policies of insurance for the benefit of the wife, advanced from the assigned fund a small proportion of such proceeds for such purpose. The negotiations not being consummated, and the bankrupt being unable to replace the sum advanced, *held*, no intention to defraud, the advance being a loan to the wife which should be embraced in the schedule. In *re Rosenfeld*, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; 8 Amer. Law Reg. (U. S.) 44; Fed. Cas. 12,057.

## CORPORATIONS.

### I. WHAT ARE

### II. PROCEEDINGS BY AND AGAINST.

### III. STOCKS AND STOCKHOLDERS.

### IV. BY-LAWS AND CONSTITUTION.

### V. RECEIVERS.

### VI. GENERAL.

See ACTS OF BANKRUPTCY, 56; BANKRUPTCY LAW, 50, 73; COMMERCIAL PAPER, 84; CONFLICT OF LAWS, 21; COURTS, 23, 89; EVIDENCE, 3; INSOLVENCY, 6; LACHES, 4; MORTGAGES, 7, 43, 47; PETITION, 1, 10, 30, 31, 45, 48; PLEADING AND PRACTICE, 149, 268, 324; PLEDGE, 5; PREFERENCE, 104; REFEREE, 20; SALES, 25; STAY OF PROCEEDINGS, 9; TRUSTEE, 22; VOTING, 13.

### I. WHAT ARE.

1. A corporation created for the purpose of carrying on any lawful business defined by its charter and clothed with power to do so is such a corporation as is contemplated

by the bankrupt act. *Rankin et al. v. Florida, etc. R. Co.*, 1 N. B. R. 196; 1 Amer. Law T. Rep. Bankr. 85; Fed. Cas. 11,567.

2. A corporation carrying on and pursuing any lawful business defined by its charter and clothed with power to do so is a business corporation and amenable to the provisions of the bankrupt act. *Alabama & Chattanooga R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126; *Id.*, 6 N. B. R. 107; 9 Blatchf. 390; Fed. Cas. 124.

3. A railroad company is a "business" corporation within the meaning of the thirty-seventh section of the bankrupt act of 1867. *Adams v. B. H. & E. R. Co.*, 4 N. B. R. 99; 1 Holmes, 30; 5 Amer. Law Rev. 375; 18 Pittsb. Leg. J. 154; Fed. Cas. 47.

4. Railway companies fall within the designation of business or commercial corporations, and are clearly within the operation of the bankrupt act. *Winter v. L. M. & N. P. R. R. Co.*, 7 N. B. R. 289; 2 Dill 487; 6 West. Jur. 562; 5 Chi. Leg. News, 74; 6 Alb. Law J. 358; Fed. Cas. 17,890. See *In re Cal. Pac. R. R. Co.*, 11 N. B. R. 193; 3 Sawy. 240; 2 Cent. Law J. 79; Fed. Cas. 2,315.

5. An insurance company is one of that class of corporations intended to be within the scope and provisions of the general bankruptcy law. *In re Merchants' Ins. Co.*, 6 N. B. R. 43; 3 Biss. 162; 20 Pittsb. Leg. J. 82; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

6. The dissolution by a state court of a corporation before the adjudication in bankruptcy, but after service of the order to show cause, does not deprive the bankrupt court of jurisdiction or abate the proceedings. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,213.

7. Although a corporation has been dissolved by decree of a state court, it still exists for the purpose of settling debts, etc., and the courts of bankruptcy have jurisdiction over it. *In re Independent Ins. Co.*, 6 N. B. R. 169; 2 Lowell, 97; Fed. Cas. 7,018; *Id.*, 6 N. B. R. 260; Holmes, 103; Fed. Cas. 7,017.

8. Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are commercial corporations within the meaning of the bankrupt act. *Sweatt v. Boston, H. & E. R. R. Co.*, 5 N. B. R.

234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer. Law T. 173; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

9. Railroad corporations are commercial corporations. The word "business" as applied to corporations has a broader meaning than the word "commercial," but it was not the intention of congress to give such a scope to the word "business" as to supersede the words "moneyed" and "commercial" and leave them without any practical signification. *Sweatt v. Boston, H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer. Law T. 174; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

10. An incorporated bridge company, where it appeared that the bridge was a connecting link between two railroads, is a commercial corporation. *Id.*

11. A railroad corporation may be adjudged a bankrupt for failure to pay its commercial paper within the period prescribed by the act authorizing its issuance. *In re Southern Minn. R. R. Co.*, 10 N. B. R. 86; Fed. Cas. 13,188.

12. Before a *de facto* corporation can exist, it must show, in addition to mere user, some law under which, with its assumed powers, it might be lawfully created. *In re Mendenhall*, 9 N. B. R. 497; Fed. Cas. 9,425.

## II. PROCEEDINGS BY AND AGAINST.

13. A moneyed, business or commercial corporation may be forced into bankruptcy under the fifth clause of the twenty-ninth section (act of 1867), if it makes any assignment, gift, sale, or conveyance, with intent to delay, defraud or hinder its creditors; or under the eighth clause, if guilty of any of the acts therein specified, without being shown to be either a banker, broker, merchant, trader, manufacturer or miner. If the proceeding be based on the ninth clause, an averment and proof of one of such characters is necessary. *Ala. & Chatt. R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126; *Id.*, 6 N. B. R. 107; 9 Blatchf. 390; Fed. Cas. 124.

14. The voluntary application of a railroad company to be adjudged a bankrupt would not be dismissed on the ground that it was not a business corporation. *Id.*

15. It was sought to have adjudged a bankrupt a railroad corporation that had

transferred the railroad and its appurtenances. It was held that the corporation did not procure the property to be taken on legal process, and that therefore no act of bankruptcy had been committed. *Rankin et al. v. Fla. etc. R. R. Co.*, 1 N. B. R. 196; 1 Amer. Law T. Rep. Bankr. 85; Fed. Cas. 11,567.

16. Where an officer of a corporation files a petition in bankruptcy by order of the board of directors of said corporation, it will be presumed after lapse of time that the action was duly authorized, and no corporator who files a petition after a silence of years will be heard to impeach the validity of the proceedings. In *re Jefferson Ins. Co.*, 11 N. B. R. 287; 2 Hughes, 255; Fed. Cas. 7,253.

17. Where the charter of a life insurance company provides that holders of policies shall be entitled to vote for trustees, and policy-holders are corporators, as such they shall be heard and obeyed before an adjudication, which is essentially a dissolution of the corporation, shall be obtained. In *re Atl. Mut. L. Ins. Co.*, 16 N. B. R. 541; 9 Ben. 270; 16 Alb. Law J. 453; 24 Int. Rev. Rec. 13; Fed. Cas. 628.

18. A proceeding in involuntary bankruptcy against a corporation is a proceeding *in rem*. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,213.

19. It is a question of fact to be determined by the district court whether the president of a corporation is duly authorized to file a petition on its behalf. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 N. B. R. 385; 91 U. S. 656.

20. By appearing and answering to a petition, a corporation admits that it may be proceeded against in bankruptcy, and afterwards it cannot object that it is not alleged that it is a moneyed, business or commercial corporation. In *re Oregon Bul. Pr. & Pub. Co.*, 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

21. A petition in bankruptcy against a corporation, which does not show that the corporation is either a moneyed, business or commercial corporation, is insufficient. In *re Oregon Bul. Pr. & Pub. Co.*, 14 N. B. R. 405; 3 Sawy. 614; 11 Am. Law Rev. 181; 3 Cent. Law J. 515; 14 Alb. Law J. 130; 3 Amer. Law T. Rep. (N. S.) 469; Fed. Cas. 10,561.

22. When a petition in bankruptcy is filed

against a corporation, it is not necessary to give authority to counsel to appear and admit the acts of bankruptcy charged, that the corporators or shareholders should previously, by vote, authorize or direct that act to be done. *Leiter et al. v. Payson*, 9 N. B. R. 205; 6 Chi. Leg. News, 157; Fed. Cas. 8,226.

### III. STOCKS AND STOCKHOLDERS.

#### See STOCKHOLDERS.

23. A purchaser of stock, which in terms is only transferable on the books of the company, is liable for an assessment levied by the assignee in bankruptcy of that company, although such transfer had not in fact been made. The provision requiring the transfers of stock to be upon the books is for the benefit of the company, and the company can waive it. *Upton v. Burnham*, 8 N. B. R. 221; 3 Biss. 431; Fed. Cas. 16,798.

24. The capital stock of a moneyed corporation, paid in and to be paid in, is a fund for the payment of its debts; the trustees cannot squander or give it away, but are bound to call in what is unpaid, and carefully husband it when received. *Upton, Ass. v. Tribilcock*, 13 N. B. R. 171; 91 U. S. 45.

25. The issue of shares of stock in a corporation appeared formal and regular on its face, but was in fact fraudulent. The books of the corporation showed that the shares were fully paid up, and nothing appeared which would put an innocent purchaser in open market on guard. *Held*, such a purchaser could not be assessed on his stock. The corporation's remedy is against the perpetration of the fraud individually. *Foreman, Ass. v. Bigelow et al.*, 18 N. B. R. 457; 4 Cliff. 508; 7 Reporter, 137; 26 Pittsb. Leg. J. 128; Fed. Cas. 4,934.

26. A railroad company whose charter provides for the forfeiture to the company of stock upon which an assessment remains unpaid may make proof in bankruptcy proceedings against the stockholder, if he has become bankrupt, of the amount previously ascertained to be due for the assessment. *Gibson et al. v. Lewis, Trustee*, 11 N. B. R. 247; 11 Phila. 476; 32 Leg. Int. 22; Fed. Cas. 5,398.

27. The capital stock of a corporation is a trust fund for the benefit of its creditors, and no transfer thereof can be made by



which, as to creditors of the company, a stockholder can relieve himself from liability for his subscription for stock and substitute that of another person. In re Bachman, 12 N. B. R. 236; 2 Cent. Law J. 119; 23 Int. Rev. Rec. 19; Fed. Cas. 707.

28. There is no liability on the stockholders in a solvent private corporation to pay the capital before an assessment, but, though an assessment has not been made, if the corporation is solvent, the stockholder may be compelled to pay at the suit of the creditors. Wilbur, Ass., v. Stockholders, 18 N. B. R. 178; 13 Phila. 479; 35 Leg. Int. 346; 26 Pittsb. Leg. J. 15; Fed. Cas. 17,636.

29. A corporation will not be held liable as a stockholder where its investment in the stock was *ultra vires*. Id.

30. If a sufficient corporate organization continues to subsist, an assessment by the corporate authorities upon the stockholders may be ordered by a court of equity at any stage of the proceedings if thought convenient for any purpose. Id.

31. Courts of equity, by virtue of their inherent jurisdiction over trusts and fraud, will enforce the proper application of the capital stock of an insolvent corporation to the payment of its debts. Upton, Ass., v. Hansbrough, 10 N. B. R. 368; 8 Biss. 417; 5 Chi. Leg. News, 242; 7 West. Jur. 238; Fed. Cas. 16,801.

32. Unpaid subscriptions to the capital stock of a corporation are assets to be used for payment of debts which corporate authorities may call in for corporate purposes; unpaid subscriptions constitute a debt due the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations, and fails to meet its payments, creditors cannot interpose. Myers, Ass., v. Seeley et al., 10 N. B. R. 411; 1 Cent. Law J. 451; Fed. Cas. 9,994.

33. If bank stock be transferred as security for the payment of money loaned, the delivery of the possession is as complete as the nature of the property will admit, the only defect in the title being the non-transfer of the stock on the books of the bank issuing the stock, and said bank can only become entitled to the stock by satisfying the debt which has been secured by the transfer, notwithstanding the fact that it

may have purchased a right to them from an assignee in bankruptcy. Second Nat. Bank of Louisville v. Bank, 11 N. B. R. 49.

#### IV. BY-LAWS AND CONSTITUTION.

34. When its charter prohibits a corporation from taking more than a given rate of interest, a contract for a larger rate is void. Tiffany v. The Boatman's Sav. Inst., 9 N. B. R. 245; 18 Wall. 375.

35. Even though a by-law regarding the transfer of stock by one indebted to the corporation conflict with the general law governing transfer of property, it is valid. In re Bachman, 12 N. B. R. 223; 2 Cent. Law J. 119; 23 Int. Rev. Rec. 19; Fed. Cas. 707.

36. A debt which is not due, as well as one due, falls within the meaning of a by-law prohibiting the transfer of stock by one who is indebted to the corporation. A liability for an unpaid balance upon the capital stock is a debt within the meaning of such by-law. Id.

37. A by-law of a corporation prohibiting the transfer of stock by one who is indebted to the corporation is proper and reasonable, and the provisions thereof cannot be waived. Id.

38. A provision that "in sales of seats for account of delinquent members the proceeds shall be applied to the benefit of the members of the board exclusive of outside creditors," in the constitution of a stock exchange board, is valid. Hyde, Ass., v. Woods et al., 15 N. B. R. 518; 94 U. S. 523.

#### V. RECEIVERS.

39. A duly appointed receiver of a corporation is the proper representative of such corporation in proceedings in bankruptcy, and as such his functions are not limited by the jurisdiction of the court from which he received his appointment. In re Republic Ins. Co., 8 N. B. R. 197; 3 Ins. Law J. 390; 5 Chi. Leg. News, 385; Fed. Cas. 11,705.

40. The receiver of a corporation which had been adjudicated a bankrupt on petition of a trustee is entitled to be heard on a motion to set aside the adjudication. In re Atl. Mut. Life Ins. Co., 16 N. B. R. 541; 9 Ben. 270; 16 Alb. Law J. 453; 24 Int. Rev. Rec. 13; Fed. Cas. 628.

## VI. GENERAL.

41. The managing officers of a corporation, when *bona fide* creditors, have the same rights to vote for assignee as any other claimant. Their debts should be very carefully examined by the register, and if he entertains suspicion they should be postponed. In so examining he should not be called upon to decide doubtful proofs. If the claim cannot be readily explained it should be postponed. In re Northern Iron Co., 14 N. B. R. 356; Fed. Cas. 10,322.

42. A corporation duly organized under state laws was adjudged a bankrupt. Creditor made proof against the estate for an alleged debt represented by a promissory note of the corporation made under its seal, and with security consisting of a mortgage executed by the corporation. The defense was that said mortgage was not executed or acknowledged by bankrupt and was not executed by authority of the bankrupt. *Held*, a corporation cannot execute a deed otherwise than under its seal, and that a lien by way of mortgage can only be created by way of seal. In re The St. Helen's Mill Co., 10 N. B. R. 411; 8 Sawy. 88; 8 West. Jur. 597; Fed. Cas. 12,223.

43. A corporation does not answer a bill in equity upon the several and respective corporate oaths of its officers, agents and servants, but under its common seal and not on oath. French, Ass., v. The First Nat. Bank of N. Y., 11 N. B. R. 189; 7 Ben. 488; Fed. Cas. 5,099.

44. A corporation created by the laws of one state is not rendered liable to be sued by process served in another state by the fact that it carries on business in the latter state, and that the process had been delivered to its officers found therein. Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97; Fed. Cas. 126; *Id.*, 6 N. B. R. 107; 9 Blatchf. 390; Fed. Cas. 124.

45. The legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it was created. *Id.*

46. A body corporate can only act in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the incorporating act. *Id.*

47. No vote or act of a corporation can en-

large its chartered authority either as to the subjects on which it is intended to operate or the persons or property of the corporators. *Id.*

48. When a specific act is directed to be done by a particular agent of a corporation it must be done by that agent. *Id.*

49. G., a stockholder in and a director and officer of a corporation, was adjudged a bankrupt. *Held*, that such bankruptcy did not incapacitate him from exercising his functions as such officer of the corporation to such extent as to render inoperative and void as to third parties acts and conveyances of the corporation when done and executed through him as its representative. The Atlas Nat. Bank v. The F. B. Gardner Co. et al., 19 N. B. R. 213; 8 Biss. 537; Fed. Cas. 635.

50. In contemplation of law, a corporation is held to know what is known by its chief officer. Loudon, Ass., v. The First Nat. Bank, etc., 15 N. B. R. 476; 2 Hughes, 420; Fed. Cas. 8,525.

51. A corporation can avail itself of the provisions pertaining to a composition. In re Weber F. Co., 13 N. B. R. 529; Fed. Cas. 17,830.

52. Only those portions of the bankrupt law that are expressly or impliedly adopted by the section relating to corporations apply to them. New Lamp C. Co. v. Ansonia B. & C. Co., 18 N. B. R. 385; 91 U. S. 656; sec. 37.

53. The provisions of section 21 of the bankrupt act of 1867 relative to staying proceedings to await the determination of the bankrupt court on the question of discharge do not apply to corporations which, under the terms of the act, can never receive such discharge. Meyer v. Aurora Ins. Co., 7 N. B. R. 191.

54. A corporation unable to pay its debts as they become due is insolvent, and a creditor has reasonable cause to believe it insolvent when such facts are brought to his notice. Buchanan et al. v. Smith, Ass., 7 N. B. R. 518; 16 Wall. 277.

55. A deed of trust made by a corporation, fulfilling the statutory requirements, is *prima facie* the deed of trust of the corporation, though not conclusive as to its validity. In re Kansas City S. & M. Mfg. Co., 9 N. B. R. 76; Fed. Cas. 7,610.

56. When certain persons associated themselves together as a corporation unlawfully,

they are individually liable, and a creditor who has dealt with them as a corporation is not estopped from proceeding against them individually. In re Mendenhall, 9 N. B. R. 497; Fed. Cas. 9,425.

57. Parties who purchase the property and franchise of a corporation from the assignee do not thereby become its corporators and acquire the corporate entity. Metz, Adm'r, etc., v. Buffalo, Corry & Pittsburgh R. R. Co., 12 N. B. R. 559.

58. In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, or to become a party to negotiable paper. In re Hercules Mut. L. Ass. S., 6 N. B. R. 338; 6 Ben. 35; 6 Alb. Law J. 358; Fed. Cas. 6,402.

59. If a foreign corporation fails to comply with a statute requiring it, before doing business, to execute a power of attorney and appoint a local agent upon whom all process might be served in suits against such corporation, the latter has no power to contract or sue in the state, and anything done by it contrary to the statute is illegal and void. In re Comstock & Co., 11 N. B. R. 169; 3 Sawy. 218; 7 Chi. Leg. News, 126; Fed. Cas. 8,078.

60. Where a state allows foreign corporations to do business within its limits it may impose such reasonable conditions as it sees fit. Lamb, Ass., v. Lamb, 18 N. B. R. 17; 6 Biss. 420; 7 Chi. Leg. News, 411; 21 Int. Rev. Rec. 317; 1 N. Y. Wkly. Dig. 818; Fed. Cas. 8,018.

## COSTS AND FEES.

### I. COSTS.

- (a) *Trustee (Assignee).*
- (b) *Attachment.*
- (c) *Attorney.*
- (d) *Bankrupt.*
- (e) *Care of Assets.*
- (f) *Creditor.*
- (g) *Mortgage.*
- (h) *Sheriff.*
- (i) *In General.*

### II. FEES.

- (a) *Trustee (Assignee).*
- (b) *Attorney.*
- (c) *Clerk.*
- (d) *Marshal.*
- (e) *Referee (Register).*

### II. FEES—continued.

- (f) *Sheriff.*
- (g) *Witness.*
- (h) *In General.*

See ADJOURNMENT, 6; ARREST, 19; CLAIMS, 4, 89, 123, 161, 187, 188, 217; DISCHARGE, 4, 82; MARSHAL, 15; MORTGAGES, 26; PLEADING AND PRACTICE, 82, 164-66, 194; PREFERENCES, 217; SALES, 11, 14; TRUSTEE, 29, 32.

### I. COSTS.

#### (a) *Trustee (Assignee).*

1. When it is desirable that a new assignee be appointed, proper order should be made protecting the former assignee against costs when he has acted with good faith. In re Mallory, 4 N. B. R. 38; Fed. Cas. 8,990.

2. Defendant moved to require plaintiff to give security for costs as trustee of an express trust, and also as a non-resident, and for other reasons. Held, that an assignee in bankruptcy is not personally liable for costs except where guilty of misconduct or bad faith. Hall, Ass. etc., v. Waterbury, 19 N. B. R. 15.

3. The compensation for assignees' services, including the pay of their counsel, is a charge upon the property, prior in right to the claims of creditors or stockholders, although such property is already in the custody of the court through its receiver. Meddaugh v. Wilson, 151 U. S. 833.

4. Composition was accepted and confirmed, which provided that assets which had within three months before bankruptcy been assigned for benefit of creditors should remain in hands of and be distributed by the voluntary assignee. Prior to confirmation petitioner had commenced suit against assignee in state court. Suit was continued at large expense, and composition was amended delivering assets to assignee in bankruptcy. Held, that petitioner was not entitled to reimbursement for costs of suit. In re Dumahaut et al., 19 N. B. R. 393; Fed. Cas. 4,126.

5. Where an assignee has improperly filed a petition in respect to property in which he was not interested, he will be obliged to pay the costs thereof personally. In re Preston, 6 N. B. R. 545; Fed. Cas. 11,394.

6. An assignee in bankruptcy filed a bill

against a creditor of the bankrupt, claiming that certain judgments and the executions issued thereon were fraudulent and void. *Held*, that under the proofs in the case and the authorities cited such judgments were obtained when the bankrupt was insolvent, such creditor having reasonable cause to believe his debtor was insolvent at the time such actions were brought; and that the creditor having fought the case to the bitter end to maintain his preference, the assignee must have costs. *Warren v. D., L. & W. Ry. Co.*, 7 N. B. R. 451; 5 Chi. Leg. News, 205; 4 Leg. Op. 533; Fed. Cas. 17,194.

7. Where a bill of complaint had been filed by an assignee without sufficient cause, but the circumstances are not so clear as to require any imputation upon the good faith of the assignee in the prosecution of the suit, the costs will be paid out of the estate in the hands of the assignee. *Coxe v. Hale*, 8 N. B. R. 563; 10 Blatchf. 56; 21 Pittsb. Leg. J. 77; Fed. Cas. 3,810.

8. A mere general allowance, in a decree annulling a voluntary assignment, of the reasonable charges and expenses of the voluntary assignee, will not include expenses of a proposed account in the state court. *Burkholder et al. v. Stump*, 4 N. B. R. 191; 8 Phila. 172; Fed. Cas. 2,165.

9. An assignee under a state law will be allowed the amount of his disbursements made before a general assignment in bankruptcy under the bankruptcy act. *Macdonald, Ass., v. Moore et al.*, 15 N. B. R. 26; 8 Ben. 579; 1 Abb. N. C. 53; 23 Int. Rev. Rec. 25; 8 N. Y. Wkly. Dig. 461; 24 Pittsb. Leg. J. 83; Fed. Cas. 8,763.

10. Where a voluntary assignment was set aside only for the reason that proceedings in bankruptcy superseded it, the voluntary assignee is entitled to all reasonable expenses and compensation for his services, where to allow it will not subject the estate to a double charge. *In re Kurth*, 17 N. B. R. 573; Fed. Cas. 7,948.

11. Where an assignment by a debtor of all his property to an assignee for the benefit of his creditors, under a state law, is avoided by one of his creditors by proceedings under the bankrupt law, *held*, that the proceedings under the state law were in fraud of the bankrupt act, and the court in bankruptcy could not allow a party the ex-

penses incurred by him in an attempt to defeat the provisions and operation of the bankrupt law. *In re Stubbs*, 4 N. B. R. 124; Fed. Cas. 13,557.

### (b) Attachment.

See JUDGMENT, 77.

12. The costs of an attachment that has been dissolved by bankruptcy may be paid out of the fund, unless the attachment did not and could not operate to preserve the property for the general creditors. *In re Holmes et al.*, 14 N. B. R. 493; Fed. Cas. 6,631.

13. An attaching creditor, whose attachment is set aside by bankruptcy proceedings, is not entitled to his costs out of the bankrupt estate, unless it is shown that the attachment was employed in aid of the proceedings and to the benefit of the creditors generally. *In re Irons & Coon*, 18 N. B. R. 95; Fed. Cas. 7,067.

14. Where an attachment is dissolved by proceedings in bankruptcy, the costs that accrued under the attachment prior to the filing of the bankrupt's petition are not a valid lien upon the property in controversy. If incurred at defendant's request, however, they might be. *In re Preston*, 6 N. B. R. 545; Fed. Cas. 11,394. *Contra*, *In re Housberger & Zibelin*, 2 N. B. R. 33; 2 Ben. 504; Fed. Cas. 6,734; *Zeiber v. Hill*, 8 N. B. R. 239; 1 Sawy. 268; Fed. Cas. 18,206.

15. Costs incurred in an attachment suit in a state court cannot be paid by the assignee in bankruptcy as a preferred debt, unless by the state law such costs are a lien against the property attached. In such a case the sheriff is the agent of the plaintiff in the action and must look to him for his fees and expenses. *Gardner v. Cook, Ass.*, 7 N. B. R. 346; Fed. Cas. 5,226.

16. Costs of attachment proceedings pending when the petition in bankruptcy is filed are not to be reckoned among the provable debts of the debtor; nor will the costs be paid from the estate unless the proceedings are auxiliary to bankruptcy proceedings or otherwise beneficial to the estate. *In re Hatje*, 12 N. B. R. 548; 6 Biss. 436; Fed. Cas. 6,215.

17. An attaching creditor having acquired a lien for his debt and costs on the property attached, which attachment was subsequently dissolved, petitioned for his expenses,

averring that the proceedings were not taken to defeat the bankrupt act. *Held*, that the attachment proceedings being only auxiliary to the bankruptcy proceedings and so for the benefit of all creditors, the expenses be allowed. *In re Ward*, 9 N. B. R. 349; Fed. Cas. 17,145.

(c) *Attorney.*

18. Application for payment of sums disbursed by the bankrupt's attorney in connection with the adjudication should be made by petition to the court, and not to the register. *In re Rosenberg*, 8 N. B. R. 18; Fed. Cas. 12,056.

19. Bankrupt's attorney applied to the register for an order on the assignee for payment of sums expended by him in connection with the adjudication. *Held*, that the matter should be brought before the court by petition. *Id.*

(d) *Bankrupts.*

See EXAMINATION OF BANKRUPT, 8.

20. A bankrupt is entitled to costs against a creditor who unsuccessfully opposes his discharge. *In re Robinson et al.*, 8 N. B. R. 17; Fed. Cas. 11,948.

21. Costs incurred after the bankruptcy by the bankrupt in contesting a claim against him, the contest having been begun before the bankruptcy, are not provable against the estate. *Sanford v. Sanford*, 12 N. B. R. 565.

(e) *Care of Assets.*

22. The costs and charges against a bankrupt for care or custody of his property prior to the filing of a petition in bankruptcy by or against him, under contract with him, express or implied, are debts of his, provable against his estate as debts simply, not as preferred claims; but for all reasonable and necessary charges for the custody of property from the date of proceedings to the taking possession thereof by the messenger or assignee, the assignee is accountable, as for like expenses incurred by him after his appointment. *Gardner v. Cook, Ass.*, 7 N. B. R. 346; Fed. Cas. 5,226. See also *In re Carow*, 4 N. B. R. 178; 41 How. Pr. 112; Fed. Cas. 2,426.

23. In his affidavit of expenses for keep-

ing property, the marshal stated that the expenses "were necessarily incurred by him and that they were just and reasonable." *Held*, not sufficient, as it should have also stated they were actually incurred and paid by him. *In re Lowenstein*, 8 N. B. R. 65; 8 Ben. 422; Fed. Cas. 8,572.

24. A sheriff having in his hands property of a bankrupt taken under an execution prior to commencement of proceedings in bankruptcy is entitled to the expenses incurred in keeping such property from the date of filing the petition until their delivery to the assignee. He must look to the party who employed him for his fees in the attachment proceedings. *Zeiber v. Hill*, 8 N. B. R. 239; 1 Sawy. 268; Fed. Cas. 18,206.

25. The estate is liable for the pasturage of the stock from the date of the institution of proceedings in bankruptcy. *In re Mitchell*, 8 N. B. R. 47; 5 Chi. Leg. News, 271; Fed. Cas. 9,657.

26. A landlord's claim for marshal's use of premises, for keeping and storing goods, and costs of reference, are costs of administration to be paid in full if the assets be sufficient; if not, they are to be paid *pro rata* with other claims of the same class. *In re Hoagland*, 18 N. B. R. 530; Fed. Cas. 6,545.

(f) *Creditor.*

See COMMITTEE, 1, 2.

27. A creditor who calls for an investigation of the conduct of an assignee, alleging fraud in the sale of bankrupt's property, should give security for the costs which may be adjudged against him upon the hearing or trial of the issue. *In re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

28. Creditors filed their petition for the involuntary adjudication in bankruptcy of a debtor, and prior to the adjudication and the appointment of an assignee procured injunctions staying proceedings in six actions in a state court against the debtor in which warrants had been issued and levied on his property. *Held*, that such creditors were entitled to be reimbursed their reasonable expenses from the assets of the bankrupt's estate. *In re Schwab*, 2 N. B. R. 155; 8 Ben. 231; 8 Balt. Law Trans. No. 9; 16 Pittsb. Leg. J. 123; Fed. Cas. 12,498.

29. A creditor having full knowledge of

the condition of his insolvent debtor, receiving a preference, should be taxed with the costs of the petition to expunge, of the assignee. In re Forsyth et al., 7 N. B. R. 174; Fed. Cas. 4,948.

30. Where in a suit in equity by an assignee to recover the proceeds of an execution in the hands of the sheriff, such proceeds are awarded to the assignee, the sheriff was allowed his legal fees and his costs of suit, and such costs were, with the costs of the assignee, charged on the creditor who had obtained an illegal preference through judgment which the assignee in the same suit sought to have set aside. Warren v. Bank, 7 N. B. R. 481; 10 Blatchf. 493; Fed. Cas. 17,202.

31. On return day of an order to show cause why bankrupt should not be discharged, a creditor appeared and requested leave to examine bankrupt under oath. Held, that the request should be granted, the creditor to pay additional costs incurred thereby. In re Jackson, 8 N. B. R. 424; Fed. Cas. 7,128.

32. A creditor who contests the validity of the claim of another is liable, upon the decision being adverse to him, for the taxable costs and disbursements of the creditor whose claim is contested, and the fees, costs and expenses of the referee. In re Troy Woolen Co., 8 N. B. R. 412; Fed. Cas. 14,203.

33. The petitioning creditor, where the adjudication has been resisted, is entitled to "the same costs that are allowed by law to a party recovering in a suit in equity." In re Sheehan, 8 N. B. R. 353; Fed. Cas. 12,738.

34. A creditor whose specifications in opposition to a discharge are overruled as insufficient is liable to the bankrupt for expenses incurred for services of counsel in contesting the opposition. In re Eidom, 8 N. B. R. 39; Fed. Cas. 4,815.

35. All creditors of a bankrupt's estate who share in the distribution thereof must contribute *pro rata* to the expenses of the proceedings. In re Williams, 2 N. B. R. 28; Fed. Cas. 17,704.

36. Creditors' expenses in attending their first meeting were not allowed; nor the deputy sheriff's charges for attempting to arrest debtor, there being no necessity or resulting benefit to the estate. In re Ward, 9 N. B. R. 849; Fed. Cas. 17,145.

37. Creditors having a lien upon property sold in bankruptcy proceedings are entitled to be paid out of the proceeds after costs of proving the lien are deducted—the fees, costs and general expenses of bankruptcy not being considered. In re Hambright, 2 N. B. R. 157; Fed. Cas. 5,973.

38. Where in fact the petitioning creditor authorized the proceedings, and so became liable for costs and other resulting responsibilities, it is not of the slightest importance to the debtor who signed the petition. In re Raynor, 7 N. B. R. 527; 11 Blatchf. 48; Fed. Cas. 11,597.

39. Creditors cannot add costs nor counsel fees to a debt to make the jurisdictional amount. In re Kelly, 5 N. B. R. 214.

40. Creditors' expenses and disbursements in seeking to defeat the bankrupt act and obtain a preference cannot be allowed. In re Archenbrow, 8 N. B. R. 420; Fed. Cas. 503.

### (g) Mortgage.

#### See MORTGAGES, 26.

41. Where mortgagee issued a *scire facias*, not against the assignee in bankruptcy, but against the bankrupt, and without notice to the assignee, and procured the bankrupt's acceptance of service and proceeded no further, held, that the proceeding was a nullity, and that costs, as on foreclosure, should not be allowed. In re Devore, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

42. Costs and commissions stipulated to be paid on foreclosure of a mortgage will not be allowed when the proceedings to foreclose are invalid. *Id.*

43. A mortgagee in possession, being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court in bankruptcy should only be charged with the reasonable expenses of the sale of such property and not with any portion of the costs in bankruptcy. In re Eldridge, 4 N. B. R. 162; 2 Biss. 362; Fed. Cas. 4,830. See also In re Ellerhorst, 7 N. B. R. 49; 2 Sawy. 219; Fed. Cas. 4,830.

### (h) Sheriff.

44. As a general rule, a sheriff's claim for costs in an attachment within four months

before bankruptcy will not be allowed against the bankrupt estate. In re Jenks, 15 N. B. R. 301; Fed. Cas. 7,276.

(i) *In General.*

45. The rate of charges to be allowed for printing advertisements of sales of real estate by order of the court shall be one dollar for each square of eight lines for the first insertion, and fifty cents for each subsequent insertion (act of 1867). In re Downing, 3 N. B. R. 181; 2 Chi. Leg. News, 313; Fed. Cas. 4,045.

46. Where bankruptcy proceedings are mainly for the benefit of secured creditors, they should defray the costs of the suit, and no more of the burden than the ratable portion of interests in the assets sought to be recovered should be placed upon the general creditors; and if for the benefit of the latter, they should pay expenses in the first instance, to be refunded on recovery out of proceeds. Freeland et al. v. Holloman et al., 9 N. B. R. 331; Fed. Cas. 5,081.

47. An assignee of bankrupt appealed from the award of arbitrators without payment of costs. *Held*, that an assignee in bankruptcy may thus appeal under the compulsory arbitration law. In re Morss v. Gritmann, Ass., 10 N. B. R. 123.

48. Where it is for the interest of the creditors that the estate be administered in the bankruptcy court, the fact that it is more expensive than proceedings looking to the same end in a state court will not control the court. In re Duryea, 17 N. B. R. 495; 2 Nat. Bank Cas. (Browne), 170; Fed. Cas. 4,196.

49. The allowance of a commission for disbursements is not limited to disbursements for court expenses. The marshal is not entitled to a commission on the value of property for the seizure or custody thereof. In re Burnell Bros., 14 N. B. R. 498; 7 Biss. 275; 3 Chi. Leg. News, 84; 3 Cent. Law J. 750; 23 Int. Rev. Rec. 386; Fed. Cas. 2,171; R. S. 829.

50. An affidavit of a petitioner, unsupported by other evidence, that he is unable to pay the costs and fees of the bankruptcy proceedings beyond the preliminary deposit of \$50, is insufficient to relieve him from

the payment of such fees and costs (act of 1867). In re Anderson, 2 N. B. R. 166; Fed. Cas. 352.

51. The register refused to proceed further in the examination of a debtor without having his fees paid or secured. *Held*, that the creditor must bear the expense of the examination in the first instance, and such refusal of the register was not ground of objection to the record of the composition. In re Tift, 18 N. B. R. 227; Fed. Cas. 14,033.

52. In a case where the petition shall be dismissed by order of the court, the debtor is entitled to recover from the petitioner the same costs that are allowed by law to a party recovering in equity. Dundore v. Coates & Bros., 6 N. B. R. 304; Fed. Cas. 4,142.

53. Costs and expenses in bankruptcy proceedings are payable out of the fund derived from the sale of the bankrupt's estate, and have priority or preference in the order for a dividend. In re Whitehead, 2 N. B. R. 180; 1 Chi. Leg. News, 326; Fed. Cas. 17,562.

54. An affidavit of a petitioner, unsupported by other evidence, does not "prove to the satisfaction of the court that he is unable to pay the costs prescribed," as required by rule 30 (act of 1867). In re Anderson, 2 N. B. R. 166; Fed. Cas. 352.

55. Out of the balance remaining after payment of all of the expenses of administration, costs of a claimant upon a reference to have the claim declared and enforced are to be paid. In re Hoagland, 18 N. B. R. 530; Fed. Cas. 6,545.

56. Where the assignee by direction of the bankruptcy court pays money to obtain a release of dower in mortgaged property in order to secure a sale of the same free of incumbrance and avoid the delay and expense of a foreclosure, said expenditure should be shared by all parties interested in the proceeds proportionately to their respective interests. In re Bartenbach, 11 N. B. R. 61; 2 Amer. Law T. Rep. (N. S.) 38; Fed. Cas. 1,068.

57. Exceptions may be taken to the taxation by the register of the costs of all the officers of the court, including the assignee. In re Dean, 1 N. B. R. 26; 1 Amer. Law T. Rep. Bankr. 9; Fed. Cas. 3,699.

## II. FEES.

(a) *Trustee (Assignee).*

58. What fees an assignee is allowed to charge and what fees must be fixed by the court. In re Davenport, 8 N. B. R. 18; Fed. Cas. 3,587; In re Pegues, 8 N. B. R. 19; Fed. Cas. 10,907; In re Tully, 8 N. B. R. 19; 2 Amer. Law T. Rep. 186; Fed. Cas. 14,235.

59. It is within the discretion of a court of bankruptcy to allow a reasonable compensation to an assignee, and the supreme court cannot regulate this discretion beforehand. In re Colwell, 15 N. B. R. 92; 2 Lowell, 523; Fed. Cas. 17,529; R. S. 5099.

60. Assignees under the state law cannot receive allowance for attorney's fees nor compensation for their own services where the debtor has been adjudged a bankrupt. In re Cohn, 6 N. B. R. 379; Fed. Cas. 2,966.

61. Assignees who intend to make charges beyond the fees mentioned in the rules laid down (act of 1867) must warn creditors of that fact in the notices of the meeting at which the account will be considered. In re Colwell, 15 N. B. R. 92; 2 Lowell, 523; Fed. Cas. 17,529.

62. Where an assignee desires to charge the estate for professional and clerical services rendered him, or additional compensation for himself, he must first obtain leave of the court, and where the application is withheld until final account he must submit to examination and prove the necessity and the reasonableness of the charges. In re Noyes, 6 N. B. R. 277; Fed. Cas. 10,371.

63. An assignee to entitle himself to a per diem must not only show that he actually spent the number of days in attention to trust, but that it was necessary to do so. In re Jones, 9 N. B. R. 491; Fed. Cas. 7,451.

64. An assignee under a general assignment for the benefit of creditors is entitled to set off the amount allowed him for his services against the claim of the assignee in bankruptcy, although his claim therefor was rejected in proceedings before the register. In re Catlin, Ass. v. Foster, 3 N. B. R. 134; 1 Sawy. 37; 3 Amer. Law T. 134; 1 Amer. Law T. Rep. Bankr. 192; Fed. Cas. 2,519.

(b) *Attorney.*

65. The claim of an attorney for services and disbursements is not a claim to be paid in full under section 28 of the act of 1867. In re Heirschberg, 1 N. B. R. 195; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 6,329.

66. Counsel fees may be allowed petitioning creditors in a petition *in invitum* to have a debtor adjudged a bankrupt. In re Waite, 2 N. B. R. 146.

67. Whether counsel fees should be allowed, and the measure thereof, rests in the discretion of the court. In re Williams, 2 N. B. R. 23; Fed. Cas. 17,704.

68. As a general rule no charge for professional services of counsel to an assignee, rendered prior to the appointment of the assignee, will be allowed. In re N. Y. Mail S. S. Co., 2 N. B. R. 137; 1 Chi. Leg. News, 210; Fed. Cas. 10,210.

69. Attorneys are not entitled to the payment as a preferred claim, out of the general fund in the hands of an assignee in bankruptcy, of fees for opposing a petition of involuntary bankruptcy. In re N. Y. M. S. Co., 2 N. B. R. 170; Fed. Cas. 10,211.

70. A petition for the adjudication of a bankrupt was filed by a creditor whose debt was much larger than all the others together, during proceedings in which a mortgage on all of the bankrupt property was set aside, assuring a dividend of twenty-five per cent. Held, that the petitioning creditor was entitled to counsel fees out of the fund. In re Waite, 2 N. B. R. 146.

71. A docket fee of \$20 is allowed to the attorney for the successful party in cases of involuntary bankruptcy where there is a trial by jury, and in those voluntary cases where the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge (act of 1867). Gordon et al. v. Scott et al., 2 N. B. R. 28; 3 Pittsb. Rep. 109; 7 Amer. Law Reg. (U. S.) 749; 6 Phila. 484; 26 Leg. Int. 276; 15 Pittsb. Leg. J. 542; 1 Amer. Law T. Rep. Bankr. 99; Fed. Cas. 5,620.

72. Petitioning creditors presented excessive counsel fees, which being protested only reasonable fees were allowed. In re Moses et al., 3 N. B. R. 1; Chase, 238; Fed. Cas. 9,675.

73. The court will order the payment of at-



torney's fees out of the estate upon written approval of the assignee. In re Montgomery, 3 N. B. R. 35; 3 Ben. 364; Fed. Cas. 9,726.

74. A petitioning creditor is entitled to be reimbursed out of the bankrupt's estate for all necessary and reasonable expenses incurred by him in prosecuting proceedings against the bankrupt. Counsel fees are such necessary expenses. In re The N. Y. S. S. Co., 3 N. B. R. 155; 7 Blatchf. 178; 3 N. B. R. 185; Fed. Cas. 10,208.

75. An extravagant allowance to counsel for creditors will not be confirmed, unless assignee and bankrupts and all creditors who have proved debts assent in writing. In re Sanger et al., 5 N. B. R. 54; Fed. Cas. 12,318.

76. A debtor who has successfully defended himself against a petition in bankruptcy may have his just expenses, including counsel fees, paid from assets in hands of assignee. In re Comstock et al., 5 N. B. R. 191; Fed. Cas. 3,074.

77. A register in bankruptcy may certify to the court the amount he has allowed counsel for assignee, for revision or approval of the court. In re Warshing, 5 N. B. R. 350; Fed. Cas. 17,209.

78. Where petition in involuntary bankruptcy was dismissed, defendant's attorney is entitled only to appearance fee of \$20 (act of 1867). Dundore v. Coates & Bros., 6 N. B. R. 304; Fed. Cas. 4,142.

79. Upon a suit by the assignee in bankruptcy against certain creditors to avoid their liens, the attorneys of those creditors, although successful, are not entitled to any counsel fees out of the general fund in addition to that given by statute; but when the fund has been benefited by the services of counsel a fee may be allowed out of such fund. In re Hope Mining Co., 7 N. B. R. 598; 2 Sawy. 351; Fed. Cas. 6,682.

80. For services rendered a bankrupt prior to adjudication an attorney is a general creditor, and must prove his debt in the usual form; but for services rendered after adjudication, and before choice of assignee, his fees may be allowed if it be clearly shown that the services were properly and necessarily rendered for the benefit of the estate of the bankrupt, in the interest of the general creditors. In re Jaycox and Green, 7 N. B. R. 140; Fed. Cas. 7,239.

81. Sums paid by assignee to his counsel

should be included in his account and submitted to the meeting of the creditors, and audited as a part of the assignee's accounts, though under special circumstances, on notice to all creditors who have proved their claims, the court may order an inquiry before such meeting. In re Hubbel et al., 9 N. B. R. 523; 19 Int. Rev. Rec. 150; Fed. Cas. 6,820.

82. Petitioning creditors are not allowed, out of the fund, a retainer paid their attorneys or for any services rendered by their attorney after adjudication of the debtor as a bankrupt. In re Comstock et al., 9 N. B. R. 88; Fed. Cas. 3,075.

83. Solicitors who prepare partnership and individual schedules for involuntary bankrupts are entitled to reasonable compensation. In re Andrews et al., 11 N. B. R. 59; 23 Pittsb. Leg. J. 41; Fed. Cas. 370.

84. Where, in involuntary bankruptcy, there has been contested litigation of the question whether acts of bankruptcy had been committed, and whether the debtor should be adjudged a bankrupt, a fee should be allowed the debtor's counsel in such litigation out of the assets of the bankrupt's estate. In re Portsmouth Sav. Fund Soc., 11 N. B. R. 303; 2 Hughes, 239; Fed. Cas. 11,208.

85. Attorneys of a voluntary bankrupt are not entitled to payment from the assets as preferred creditors for their services in preparing the petition and schedules, but may prove their debt in the usual manner. In re Gies, 12 N. B. R. 179; 7 Chi. Leg. News, 379; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 5,407.

86. The bankrupt may retain from the proceeds of a mortgage executed two days before his adjudication the sum paid counsel for preparing his petition and schedules, and an amount, to be determined by the assignee, sufficient for the support of himself and family, not exceeding, with his other exemptions, the sum of \$500. In re Thompson, 13 N. B. R. 300; 2 N. Y. Wkly. Dig. 4; Fed. Cas. 13,938.

87. If an insolvent debtor pay a retainer to counsel to assist him in the proper discharge of his duty under the bankrupt law, the payment is valid; but it is void if made with a view to prevent his property from being distributed under the act, and the attorney knows him to be insolvent. Goodrich v. Wilson, 14 N. B. R. 555.

88. A petition for an additional allowance of \$250 to assignee's attorneys when the assets amount to \$1,360, of which \$725 had been already disbursed, mainly in attorney's fees, was dismissed. In re Drake, 14 N. B. R. 150; 3 N. Y. Wkly. Dig. 50; Fed. Cas. 4,058.

89. An assignee obtained authority from the court to employ counsel to prosecute a claim on a contingent contract for fees, but suppressed facts which were known to the attorneys employed, which if known to the court would have prevented the giving of such authority. *Held*, that the contract could be set aside by the court, but a reasonable compensation should be paid counsel for services actually rendered. Maybin v. Raymond, Ass., 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,888.

90. Creditor obtained a lien against goods sold by assignee, by judgment and execution against the bankrupt before petition in bankruptcy was filed. In his bill for expenses the assignee included rent of building, the marshal's and auctioneer's fees, and an attorney's fee for services in assignee's contest with a judgment creditor for property on which the latter had a lien. *Held*, that all except the last item should be allowed. In re Peabody, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

91. An assignment was made for the benefit of creditors. Subsequently, on his own petition, the assignor was adjudged a bankrupt and an assignee in bankruptcy appointed, whereupon the common-law assignee turned over all the property in his hands, retaining only enough to reimburse himself for payments made on account of collections, for personal services as assignee and for attorney's fees. *Held*, that he was not entitled to priority for his personal services and attorney's fees, but they should be proved as any other claim. In re Lains, 16 N. B. R. 168; 1 N. W. Rep. (O. S.) 116; 6 Amer. Law Rec. 266; 24 Pittsb. Leg. J. 207; Fed. Cas. 7,989.

92. In a suit for the benefit of the bankrupt and W. a judgment was recovered, appeal taken and bankruptcy proceedings begun at about the same time, assignee being substituted for bankrupt, but afterwards, under order of court, withdrew and assigned all interest to W. The judgment was reversed. *Held*, the counsel were entitled to pay for services only after the substitution,

and W. assumed all burdens by taking the assignment and could not demand reimbursement. In re Litchfield, 18 N. B. R. 347; 26 Pittsb. Leg. J. 76; Fed. Cas. 8,386.

93. The assignee has no power, without permission of court, to employ an attorney to conduct suit on a contingent fee. In re Brinker et al., 19 N. B. R. 195; Fed. Cas. 1,882.

94. The allowance of counsel fees was within discretion of the trustee and committee chosen to assist him, and, in the absence of bad faith, would not be interfered with by the court. In re Baxter et al., 19 N. B. R. 295; Fed. Cas. 1,122.

95. County court disallowed \$876 of final account of S., a bankrupt, administrator of one McQ., and ordered said amount to be distributed among the heirs. M., attorney for heirs, gave notice of lien on decree for fees. On special agreement as to fees, the attorney had no lien on judgment. In re Scoggin, 19 N. B. R. 197; 5 Sawy. 549; 8 Reporter, 330; 11 Chi. Leg. News, 367; Fed. Cas. 12,511.

96. The bankrupt court has power to determine in a summary manner the amount of attorney's fee, and to order their attorney to pay over balance of moneys retained by him for his services. In re Brinker et al., 19 N. B. R. 195; Fed. Cas. 1,882.

#### (c) Clerk.

97. Exceptions were made to allowance of clerk's fees for filing, certification and entry of order to record assignment, for filing, certifying and entry of assignment, for making certified copy of deed of assignment, and for issuing warrant in bankruptcy. *Held*, that the charges should be allowed. In re Alexander, 3 N. B. R. 20; 3 Amer. Law T. 137; Fed. Cas. 163.

#### (d) Marshal.

See MARSHAL, 15.

98. Where the only object of a motion to vacate a provisional warrant was to deprive the marshal of his fees, and where the warrant was issued on papers regular on their face, and upon affidavits showing the necessity for its issue, the motion was denied. In re Clark et al., 17 N. B. R. 554; Fed. Cas. 2,811.

99. The marshal may not charge two fees for serving the order to show cause, and the

copy of the involuntary petition, they constituting but one writ. In *re Hellmar*, 17 N. B. R. 362; 4 Sawy. 163; Fed. Cas. 6,342.

100. Where the marshal makes a charge for the time employed in personally taking care of the bankrupt property, or for taking an inventory of it by his oath as to the fact of his service and the necessity for it, he cannot charge one dollar an hour for assistants so employed. *Id.*

101. The marshal is entitled to a fee of \$2 for serving a copy of the petition, as well as the order to show cause, on the debtor in an involuntary case. In *re Burnell Bros.*, 14 N. B. R. 498; 7 Biss. 275; 9 Chi. Leg. News, 84; 3 Cent. Law J. 750; 22 Int. Rev. Rec. 386; Fed. Cas. 2171; R. S. 829.

102. For the custody of property taken under a provisional warrant the marshal is entitled to what is paid to a keeper, not to exceed \$2.50 a day. In *re Johnson et al.*, 12 N. B. R. 345; Fed. Cas. 7,422.

103. The allowance for the personal attention of the marshal in taking care of property can be made only when he himself necessarily gives his personal attention, and does not cover personal attention by a deputy. *Id.*

104. When a taxation is made, it is conclusive as respects the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of the bill taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee. In *re Rein*, 13 N. B. R. 551; 8 Ben. 384; Fed. Cas. 11,678.

105. Where process is sent by mail from the marshal's office to a deputy marshal residing at the place where service is made, and by him returned in the same manner, mileage will be allowed for a service so made. In *re Donahue et al.*, 8 N. B. R. 453; Fed. Cas. 3,979.

106. The adjudication of a corporation having been set aside, the marshal applied for an order requiring the petitioner to pay his fees and for an attachment. *Held*, that the court had no power to grant attachment in such case. In *re Atlantic Mut. Ins. Co.*, 17 N. B. R. 368; 9 Ben. 337; Fed. Cas. 629.

#### (e) *Register (Referee).*

See REFEREE, 41-49.

107. The register may require that his lawful fees be paid before proceeding in an

examination of a debtor, and may charge one dollar for his certificate. In *re Tift*, 17 N. B. R. 550; Fed. Cas. 14,030.

108. A register is entitled to the compensation and percentage allowed by the act to assignees for the custody of goods and the proceeds of the sale thereof which have been surrendered to him and cared for and sold under his direction, pending the appointment of an assignee. In *re Loder et al.*, 2 N. B. R. 162; 3 Ben. 211; 2 Amer. Law T. 106; 1 Amer. Law T. Rep. Bankr. 159; Fed. Cas. 8,455.

109. If a trustee appointed under section 43 of the act of 1867 call a second general meeting of the creditors, the fees of the register incident to such meeting are not chargeable against the estate. In *re Hinsdale et al.*, 12 N. B. R. 480; 6 Ben. 231; 1 N. Y. Wkly. Dig. 127; Fed. Cas. 6,525.

110. A question as to charges of a register in bankruptcy may be raised by an exception, or may, at the request of a party, be certified by the register. In *re Sherwood*, 1 N. B. R. 74; 25 Leg. Int. 76; 1 Amer. Law T. Rep. Bankr. 47; 6 Phila. 461; Fed. Cas. 12,774.

111. The fees and charges of a register, including those for expenses, may fall short of or exceed the amount of the deposit of \$50 required by section 47 (act of 1867). In an unopposed case, where there is no estate, he cannot be allowed his actual traveling and incidental expenses to an amount exceeding any reasonable proportional part of the deposit. *Id.*

112. Under section 4 and general order 29, where an assignee examines a bankrupt before a register under section 26, the assignee must pay the fees of the register for such examination, and, if there are assets, the court can reimburse the assignee (act of 1867). In *re Hughes*, 1 N. B. R. 9; 2 Ben. 85; 1 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 6,841.

113. Although register of a court of bankruptcy rendered certain services prior to the adoption of a rule, he must be governed by the rule, and the court can allow no fees not provided for in said rule. In *re Carstens*, 15 N. B. R. 250; 14 Blatchf. 117; Fed. Cas. 2,469.

114. What charges the register may make and what charges he may not make, defined. In *re Alexander*, 3 N. B. R. 20; 2 Amer. Law T. 137; Fed. Cas. 163.

115. Register's legal fees must be paid by creditor who applies for order of examination. In re Macintire, 1 N. B. R. 11; Bankr. Reg. Supp. 3; 1 Ben. 277; Fed. Cas. 8,821.

116. Register's fee in Michigan, for taking ordinary proof of debt, since recent amendment went into effect, is one dollar and eighty-seven and a half cents (act of 1867). In re Clarke, 10 N. B. R. 141.

117. It is the duty of the register to examine and regulate charges, whether creditors object or not. In re Sawyer, 16 N. B. R. 460; 2 Lowell, 55: 15 Alb. Law J. 280; Fed. Cas. 12,896.

(f) *Sheriff.*

118. A sheriff is not entitled to fees and expenses for the attachment levy, care and custody of property of a debtor which was attached at the suit of creditors before his adjudication in bankruptcy, but upon which judgment was not rendered until subsequently. In re Williams, 2 N. B. R. 79; 3 Amer. Law Rev. 374; 1 Amer. Law T. Rep. Bankr. 107, 113; Fed. Cas. 17,705.

119. Under attachment issued prior to the filing of the petition in bankruptcy, the sheriff was entitled to a lien upon the property for only such fees as accrued prior to the filing of the petition. In re Hausberger, 2 N. B. R. 33; 2 Ben. 504; Fed. Cas. 6,734.

120. A sheriff cannot claim fees for executions issued subsequent to the filing by the defendant of a petition in bankruptcy. Before such filing he is entitled to his fees out of the proceeds of the personal estate. Platt v. Stewart et al., 11 N. B. R. 191; Fed. Cas. 11,221.

(g) *Witness.*

See EVIDENCE, 71.

121. Only the actual days of attendance are considered in computing fees of a witness, and days on which he was merely to attend are not included. In re Crane & Co., 15 N. B. R. 120; 1 Tex. Law J. 41; Fed. Cas. 3,352.

122. The fees of a witness for going and returning once, and for one day's attendance, must be tendered and paid to him at the time of the service of the summons or subpoena. If there be an adjournment, the witness must be paid for another day's attendance before he is bound to attend on the adjourned day. In re Griffen, 1 N. B. R. 83;

2 Ben. 209; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 5,810.

123. The wife of a bankrupt is entitled to witness fees for attendance and travel. Id.; In re Van Tuyl, 2 N. B. R. 25; Fed. Cas. 16,881.

124. A creditor proving his claim is a "party" to the proceedings and in no sense a witness, and is not entitled to fees. In re Paddock, 6 N. B. R. 396; Fed. Cas. 10,658.

125. A bankrupt making further statements after creditor has closed his examination is his own witness and must pay expenses. In re Mealey, 2 N. B. R. 51; Fed. Cas. 9,378.

126. A non-resident creditor is not entitled to witness fees under an order to appear and be examined. In re Kyler, 2 N. B. R. 650; 2 Ben. 414; Fed. Cas. 7,956.

127. Witness fees must be paid by the party for whose benefit the examination is taken. Scofield v. Moorhead, 2 N. B. R. 1; Fed. Cas. 12,510.

128. A bankrupt is not entitled to witness fees on appearance for examination. In re Okell, 1 N. B. R. 52; 1 Amer. Law T. Rep. Bankr. 32; 3 Pittsb. Leg. J. (N. S.) 233; Fed. Cas. 10,474.

(h) *In General.*

129. An assignee must show affirmatively the necessity of employing an auctioneer or the auctioneer's charges will not be allowed. In re Sweet, 9 N. B. R. 48; 21 Pittsb. Leg. J. 82; Fed. Cas. 18,688.

130. A bankrupt when ordered to appear for examination in reference to his bankruptcy is not entitled to any fees or compensation therefor. In re McNair, 2 N. B. R. 77; Fed. Cas. 8,907.

131. A messenger cannot claim fees which are not designated in the act. In re Talbot, 2 N. B. R. 93; 2 Amer. Law T. Rep. Bankr. 15; 1 Chi. Leg. News, 107; Fed. Cas. 18,727.

132. Travel by marshal or messenger to make return on warrant of bankruptcy is necessary and he is entitled to mileage. Id.

133. Notaries taking proofs of debt in bankruptcy proceedings are not entitled to priority of payment of their fees under section 28 of the act of 1867. In re Nebe, 11 N. B. R. 289; Fed. Cas. 10,073.

134. An order for the payment of fees and expenses incurred in bankruptcy pro-

ceedings out of funds in the hands of the assignee is an order for distribution, and, when unopposed, may be made by the register. In re Lane, 2 N. B. R. 100; 8 Ben. 98; 1 Chi. Leg. News, 128; Fed. Cas. 8,042.

## COUNTER-CLAIM.

See SET-OFF.

## COURTS.

### I. PROCESS, PLEADING AND PRACTICE.

- (a) *Process.*
- (b) *Pleading and Practice.*
- (c) *Adjudication.*
  - (1) In General.
  - (2) Notice.
- (d) *Jury Trials.*
- (e) *Habeas Corpus.*

### II. JURISDICTION.

- (a) *United States Courts.*
  - (1) Circuit Court.
  - (2) District Court.
  - (3) Over State Laws and Proceedings.
  - (4) In General.
  - (5) Exemption.
  - (6) Residence and Alien.
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- (b) *Liens.*
  - (1) In General.
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- (c) *Partners.*
- (d) *Bond.*
- (e) *State Courts.*
  - (1) Suits.
    - (a) By Assignee (Trustee).
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  - (2) Acts.
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### II. JURISDICTION—continued.

- (5) In General.
- (6) Mortgage Foreclosure.
- (f) *Wife's Rights.*
- (g) *Debts and Assets.*
- (h) *Corporations.*

### III. COMPOSITION AND COMPROMISE.

### IV. CRIMES AND OFFENSES.

### V. RULES, FORMS AND ORDERS.

### VI. COMPUTATION OF TIME.

### VII. TRANSFER OF CAUSES.

### VIII. CLAIM.

- (a) *Filing and Withdrawal.*
- (b) *Preference.*

See APPEALS AND WRITS OF ERROR, 19, 81, 82, 85, 88; BANK, 33; BANKRUPTCY LAW, 1; CONFLICT OF LAWS, 3; CONVEYANCES, 47; COSTS AND FEES, 85; DISCHARGES, 32, 69, 75, 78, 94, 95, 222, 235, 818; ESTATES, 6-8, 125; EVIDENCE, 65; INJUNCTION, 7, 87, I, (e); INSOLVENCY, 3; INTERVENTION, 16; LIMITATIONS, STATUTE OF, 43, 50; MARSHAL, 4; PETITIONS, 44, 106, VI; REFERENCE, 6; SALES, 25, 52, 63, 85, 91, 114, 118; STATUTORY CONSTRUCTION, 33, 34; STAY OF PROCEEDINGS, 4; STOCKHOLDERS, 7, 9, 17; TRUSTEES, 10, 42, 90, 92, 104, 166.

### I. PROCESS, PLEADING AND PRACTICE.

#### (a) *Process.*

See ARREST, 6.

1. A warrant commanding the marshal to take possession provisionally of all the effects of the bankrupt, and of all the assets and property conveyed by the bankrupt, whether by bill of sale or otherwise, is beyond the power of the court in so far as it commands the marshal to take property conveyed before the filing of a petition by the bankrupt. In re Harthill, 4 N. B. R. 181; 4 Ben. 448; Fed. Cas. 6,161.

2. A court, when it is satisfied its process is being used for sinister, oppressive and vexatious purposes, has power to dismiss the proceeding. In re Hamlin et al., 16 N. B. R. 522; 8 Biss. 122; 10 Chi. Leg. News, 131; Fed. Cas. 5,994.

3. Petition was filed in the district court for the southern district of New York. Personal service was made on appellant in Jersey City, N. J. The court held it was not suffi-

cient service to give the court jurisdiction to adjudicate against appellant. *Isett v. Stuart*, 16 N. B. R. 191.

### (b) *Pleading and Practice.*

See PLEADING AND PRACTICE, 80, 114, 213, 218.

4. In the absence of any decision to the contrary by the highest court of a state, the decisions and practice of the circuit courts may be taken as the law. In *re Bjornstad*, 18 N. B. R. 282; 9 Biss. 13; Fed. Cas. 1,453.

5. A person not a party to the record in the district court applied for a revision in the circuit court, alleging that the petition in bankruptcy was not filed until after the order to show cause was made. *Held*, that a stranger to the record cannot file a petition for revision; that as the district court amended the record to show petition filed before order made, such action is conclusive, and that the revisory power of the circuit court does not extend to questions not presented to the bankrupt court. *Alabama & Chattanooga R. R. Co. v. Jones*, 7 N. B. R. 145; Fed. Cas. 127.

6. Where a petition is filed in the circuit court, if grounds for removal exist, that court will direct the district court to remove the assignee and appoint a competent person in his stead. In *re Perkins*, 8 N. B. R. 56; 5 Biss. 254; Fed. Cas. 10,982.

7. A judge of a district court may decline to answer questions certified to him which are not "points or questions arising in the course of the proceedings before the register or upon the result of such proceedings." In *re Bray*, 2 N. B. R. 53; 1 Chi. Leg. News, 80; Fed. Cas. 1,818.

8. The district court sitting in bankruptcy has a right to recall a final decree granting a discharge to a bankrupt upon application in the term at which the decree was passed. It *seems* that the court also has the power after the term has ended. In *re Dupee*, 6 N. B. R. 89; 2 Lowell, 18; Fed. Cas. 4,183.

9. In the discharge of their functions, the personal conduct and administration of the federal judges need not conform to the practice in the state courts. *Nudd et al. v. Burrows, Ass.*, 13 N. B. R. 289; 91 U. S. 426.

10. Plaintiff filed a bill for recovery of property against the bankrupt, his wife and a third party. The bankrupt and wife de-

murred on grounds that court was without jurisdiction and that there was a misjoinder of parties. The court held that matter in dispute exceeded \$500, and suit being between citizens of two different states, the court had jurisdiction, and that only those improperly joined can take advantage of misjoinder. *Spaulding, Ass. v. McGovern et al.*, 10 N. B. R. 188; Fed. Cas. 13,217.

11. A court of equity will not entertain the question of marshaling assets unless both funds are within the jurisdiction of the court. *Lewis, Tr., v. United States*, 14 N. B. R. 64; 92 U. S. 618.

12. Permission for the petitioning creditors to withdraw will be denied whenever necessary in the furtherance of the objects of the bankrupt act. In *re Sheffer*, 17 N. B. R. 369; 4 Sawy. 363; 1 San Fran. Law J. 117; Fed. Cas. 12,742.

13. A petition was dismissed with leave to amend. Before amendment one of the creditors assigned his claim. The remaining creditors did not represent the amount of debts required. The court held the amended petition should be dismissed, as it is in the discretion of the court to allow the assignment. In *re Western Sav. & Tr. Co.*, 17 N. B. R. 413; 4 Sawy. 190; Fed. Cas. 17,442.

14. Property was levied on by sheriff, but was replevied by parties claiming to own same. In meantime marshal took property under warrant of bankruptcy. On affidavits for order to deliver back to claimant, *held*, the parties had their remedy by suit against assignee or marshal. In *re Davidson*, 2 N. B. R. 114; 2 Ben. 206; Fed. Cas. 3,598.

### (c) *Adjudication.*

#### (1) In General.

15. The omission of the court in a voluntary case to adjudicate the debtor a bankrupt does not defeat a composition made before such adjudication. In *re Van Auken et al.*, 14 N. B. R. 425; Fed. Cas. 16,828; R. S. 5014.

16. A debtor denied the acts of bankruptcy and demanded trial. Subsequently a memorandum signed by the judge was made on the petition, directing that an order of adjudication be entered, but no such order was entered prior to June 22, 1874. On an ap-

plication to sign such order *nunc pro tunc*, the court held that the debtor cannot be adjudged a bankrupt except on order, and therefore remained "to be adjudged a bankrupt," and the court was deprived of the power to adjudge a debtor a bankrupt on a petition filed since December 1, 1873, unless "one-fourth in number and one-third in value of the creditors" made application (act of 1867). *In re Hill*, 10 N. B. R. 133; 7 Ben. 378; 1 Amer. Law T. Rep. (N. S.) 421; 20 Int. Rev. Rec. 81; Fed. Cas. 8,484.

17. Where a party shows that there is reasonable doubt of his liability on a note for the non-payment of which his adjudication in bankruptcy is sought, accompanied with evidence of a condition of solvency in fact, and the payment of all other just claims, and showing that the non-payment complained of was because he did not owe the debt, and also the further fact that no demand had ever been made for the payment upon him a court of bankruptcy should not entertain jurisdiction, but should dismiss the petition, and turn the parties over to the ordinary remedies provided in cases to collect debts. *In re Munn*, 7 N. B. R. 468; 8 Biss. 442; 7 Amer. Law Rev. 751; Fed. Cas. 9,925.

18. In cases of involuntary bankruptcy, an order of the court is necessary to adjudge the party proceeded against a bankrupt, and a warrant cannot issue against his property until such an order has been made. *Maxwell v. Faxton*, 4 N. B. R. 60.

19. Sections 1 and 2 of the act of 1867 do not confer exclusive jurisdiction on the United States courts in suits for the enforcement of rights created by the act, or for the collection of assets of the bankrupt, but only as to the adjudication of any one bankrupt. *Cook v. Waters et al.*, 9 N. B. R. 155.

20. Courts have no authority to exercise discretion in the entertainment of actions over which they are given jurisdiction when properly applied to for the exercise thereof. *Id.*

## (2) Notice.

See NOTICE, 65.

21. The courts are bound to take notice of the act of congress establishing a uniform system of bankruptcy throughout the United States, and the allegations that "the insol-

ents are adjudged bankrupts pursuant to said act," and "the plaintiff in like manner appointed assignee in bankruptcy," are sufficient in view of the fact that, in the absence of an answer raising an issue upon this point, all the presumptions are in favor of the regularity of the bankrupt proceedings. *Wheeler v. Lee*, 10 N. B. R. 363.

22. When it is admitted that the plaintiff has been adjudged a bankrupt, a state court may presume that an assignee has been appointed and the sale by him of the bankrupt's assets. *Morris et al. v. Swartz*, 10 N. B. R. 305.

23. As respects the corporation, a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, and if the court rendering it had jurisdiction it can only be assailed by a proceeding in a competent court, unless due notice of the petition was never given or the decree is void in form. *New Lamp C. Co. v. Ansonia B. & C. Co.*, 13 N. B. R. 385; 91 U. S. 856.

## (d) Jury Trials.

See JURY TRIALS, IV.

24. Incidental to the trial of jury causes, all courts of record, unless specially restricted, possess the power of revising verdicts of juries and setting them aside, in all civil cases, in their discretion. *In re De Forest*, 9 N. B. R. 278; Fed. Cas. 3,745.

25. It is not error for a court to submit a question as to the existence of a partnership to the jury instead of charging them as a matter of law, it being a matter of discretion with a court to take a matter from the jury, whether a point is undisputed or not. *In re Jelsh et al.*, 9 N. B. R. 412; Fed. Cas. 7,257.

26. A bankrupt court has no authority to deprive the assignee of the possession of the bankrupt's property without due process of law, unless the parties consent to a trial by the court. *Wood M. & R. M. Co. v. Brooke*, 9 N. B. R. 395; 2 Sawy. 576; Fed. Cas. 17,980.

## (e) Habeas Corpus.

See HABEAS CORPUS.

27. On a writ of *habeas corpus* the circuit court cannot review the opinion of the court below on the evidence. *In re Salkey et al.*, 11 N. B. R. 516; 6 Biss. 280; 7 Chi. Leg. News, 195; Fed. Cas. 12,254.

28. A United States court has power to relieve a bankrupt from arrest on process of state court. The question whether the debt be one contracted by fraud may be examined into and determined by the district court. *In re Glaser*, 1 N. B. R. 73; 2 Ben. 180; Fed. Cas. 5,474.

29. The circuit court cannot go behind a general finding of a district court to inquire into the weight and sufficiency of the evidence. *Babbitt v. Burgess*, 7 N. B. R. 561; 2 Dill. 169; 5 Chi. Leg. News, 326; Fed. Cas. 693. See § 215, *post*.

## II. JURISDICTION.

### (a) *United States Courts.*

#### (1) Circuit Court.

30. G. filed in a United States circuit court as a creditor a bill against the bankrupt, assignee in bankruptcy and others to reach property fraudulently concealed or conveyed by the bankrupt. It was held that the circuit court had no jurisdiction. *Glenny v. Langdon et al.*, 19 N. B. R. 24; 98 U. S. 20.

31. The circuit court has no jurisdiction to grant an injunction to restrain a bankrupt from proceeding in a state court to obtain an injunction restraining creditors from continuing proceedings in bankruptcy. *In re Clark et al.*, 8 N. B. R. 122; 1 Amer. Law T. Rep. Bankr. 186; Fed. Cas. 2,804.

32. Original jurisdiction is conferred by the bankrupt act upon circuit courts, concurrent with the district court of the same district, in suits at law or in equity which may be brought by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any property of the bankrupt. *Shearman v. Bingham et al.*, 7 N. B. R. 490.

33. Objection was made to the jurisdiction of the circuit judge on the ground that he was disqualified, having been a depositor in the bankrupt banking institution. *Held*, that having sold his claim and having no further interest in the assets, he is not disqualified, although the motive on the part of the purchaser of the claim may have been to remove the disqualification. *In re Sime & Co.*, 7 N. B. R. 407; 2 Sawy. 320; 5 Pac. Law Rep. 217; Fed. Cas. 12,860.

34. Assignee of a Chicago bankrupt sued

in the United States circuit court in Iowa to recover a debt due the estate from a citizen of Iowa. On motion to dismiss for want of jurisdiction, *held*, that the court had jurisdiction. *Payson v. Dietz*, 8 N. B. R. 193; 5 Chi. Leg. News, 434; 30 Leg. Int. 313; Fed. Cas. 10,861.

35. A suitor who, by the provisions of the judiciary act, would be entitled to sue in the circuit court, is not restricted to the district court in cases prescribed by the bankrupt act by reason of being an assignee. *Id.*

36. Except when special provision is otherwise made, the circuit courts have a general jurisdiction of all cases and questions arising under the bankrupt act. *Coit v. Robinson et al.*, 9 N. B. R. 289; 19 Wall. 274.

37. The concurrent jurisdiction conferred upon the circuit court by section 2 of the act of 1867 is limited to cases where there is a controversy concerning the *right to* or some *interest in* some specific thing between the assignee and a third person, and does not include an action to collect a simple debt. *Brooke, Ass., v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

38. Ordinarily nothing can be done but dismiss a suit when both the circuit court and the supreme court are without jurisdiction; but this rule would not apply where the circuit court had rendered a judgment in favor of the party bringing the suit. In such a case the supreme court will reverse the judgment in the court below and remand with directions to dismiss. *Stickney, Ass., v. Wilt*, 11 N. B. R. 97; 23 Wall. 150.

39. The circuit court has no supervisory jurisdiction in a petition of review where rights of property are claimed. *Id.*

40. In suits brought by an assignee appointed in another district, circuit and district courts have concurrent jurisdiction. *Lothrop v. Drake et al.*, 13 N. B. R. 472; 91 U. S. 516.

41. A bill was filed in the circuit court against a mortgagee in possession of the mortgaged goods, to restrain him from selling, and praying that he account to the assignee for the goods, when the assignee was appointed. Defendant demurred for want of jurisdiction. *Held*, that the jurisdiction to entertain such a suit was in the district court, not in the circuit court. *Johnson et al. v. Price*, 13 N. B. R. 523; Fed. Cas. 7,407.

42. Under the act of 1867 the district and



circuit courts of the United States have jurisdiction of causes resulting from proceedings in bankruptcy pending in other districts. *Claffin v. Houseman*, 15 N. B. R. 49; 93 U. S. 130.

43. Circuit courts have concurrent jurisdiction with district courts of all actions by an assignee against persons claiming an adverse interest in the estate of the bankrupt. *Hallack et al. v. Tritch, Ass. etc.*, 17 N. B. R. 298; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

#### (2) District Court.

44. The jurisdiction of the United States district court, sitting as a court of bankruptcy, is exclusive in all matters arising under the bankrupt act. In *re Barrow*, 1 N. B. R. 125; 1 Amer. Law T. Rep. Bankr. 63; Fed. Cas. 1,057.

45. United States district courts have full and adequate jurisdiction in all matters relating to bankruptcy. The jurisdiction, however, to sell real estate and pay off liens is not exclusive. In *re Bowie*, 1 N. B. R. 185; 15 Pittsb. Leg. J. 448; 1 Amer. Law T. Rep. Bankr. 97; Fed. Cas. 1,728.

46. The district court has power to reverse the decision of assignee rejecting a claim, but the assignee should have opportunity to answer and contest the claim. In *re Mittedorfer*, 3 N. B. R. 9; *Chase*, 270; Fed. Cas. 9,674.

47. The district court has no authority to withdraw cases from state court and proceed to trial. *Clark v. Burton*, 4 N. B. R. (8 vo. ed.) 2.

48. The bankrupt act of 1867 requires the court to exercise a judicial discretion in affirming or refusing to affirm the action of creditors in the removal of an assignee. In *re Dewey*, 4 N. B. R. 139; 1 Lowell, 493; Fed. Cas. 3,849.

49. A suit will be dismissed upon plea for want of jurisdiction where it appears that bankruptcy proceedings are pending in another district. *Sherman et al. v. Bingham et al.*, 5 N. B. R. 84; 1 Lowell, 575; 3 Chi. Leg. News, 258; Fed. Cas. 12,733.

50. The United States district court has no jurisdiction over a petition filed by a creditor of the bankrupt who claims the property by virtue of an unrecorded mortgage and bills of sale of earlier date than a mortgage given to the wife of a bankrupt by a firm of which the bankrupt is a member. *Barstow*

*v. Peckham et al.*, 5 N. B. R. 72; Fed. Cas. 1,064.

51. The court has jurisdiction when a petition in bankruptcy is filed, notwithstanding the insufficiency of the verification, and has therefore power to allow an amendment to it. *Id.*

52. While proceedings are pending in one district it is improper to grant an adjudication in another, as the petition first filed takes the precedence. In *re Leland*, 5 N. B. R. 222; 5 Ben. 168; Fed. Cas. 8,228.

53. Where the district courts of two districts have jurisdiction over a debtor, the one whose jurisdiction is first invoked shall have entire control of the proceedings. In *re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

54. The bankrupt court of one district has no jurisdiction in an action brought by the assignee in bankruptcy appointed by the bankrupt court of another district, where the proceedings are pending. *Jobbins v. Montague*, 6 N. B. R. 509; Fed. Cas. 7,830.

55. Where the court is without jurisdiction, no voluntary act of the defendant can give such jurisdiction, and the point can be raised even after answer. *Id.*

56. A suit may be maintained by an assignee in bankruptcy to collect the assets of the bankrupt in district courts other than those where the proceedings are pending. *Goodall v. Tuttle*, 7 N. B. R. 193; 3 Biss. 219; 5 Amer. Law T. Rep. (U. S. Cts.) 240; 7 West. Jur. 32; 4 Chi. Leg. News, 473, 485; Fed. Cas. 5,533.

57. District courts in the exercise of their exclusive original jurisdiction may act in administrative matters as well in vacation as in term time, and a judge sitting at chambers in such matters has the same jurisdiction as when sitting in court, and all such adjudication, orders and decrees may be revised in the circuit court within the district where the proceedings in bankruptcy shall be pending under the bankrupt act (act of 1867). *Shearman v. Bingham et al.*, 7 N. B. R. 490.

58. It is competent for the district court to make an order for the examination of the debtor prior to an adjudication of bankruptcy; but when sought for the purpose of prying into the business of the debtor or any purpose other than the furtherance of jus-

tice and the protection of the creditors, such examination should not be allowed. In re Salkey et al., 9 N. B. R. 107; 5 Biss. 486; 6 Chi. Leg. News, 69; 2 Amer. Law Rec. 502; 21 Pittsb. Leg. J. 56; Fed. Cas. 12,252.

59. The summary jurisdiction of the bankrupt court over the bankrupt ceases with the granting of his discharge. In re Dole, 9 N. B. R. 193; 11 Blatchf. 499; Fed. Cas. 3,964.

60. The district court will order the production of books and papers at the summary hearing on the return day of the order to show cause; the fifteenth section of the judiciary act of 1789 being applicable to such cases, and if not, plenary power is given by the general scope of the bankrupt law. In re Mendenhall, 9 N. B. R. 285; Fed. Cas. 9,423.

61. As soon as bankruptcy proceedings are commenced the bankrupt court acquires sole jurisdiction, and may enjoin further proceedings in other courts. Penny v. Taylor, 10 N. B. R. 200; Fed. Cas. 10,957.

62. The jurisdiction of the bankrupt court ceases with the granting of a discharge, and the plaintiff may then apply to the state court for relief. *Id.*

63. Under the bankrupt act district courts have jurisdiction both in law and equity. In re Fendley, 10 N. B. R. 250; 3 Amer. Law Rec. 105; Fed. Cas. 4,728.

64. The United States district court sitting in bankruptcy has complete jurisdiction to administer the estate of the bankrupt. Allen & Co. v. Montgomery et al., 10 N. B. R. 503.

65. The petition, adjudication and warrant give the court complete jurisdiction for all purposes whatsoever. In re Archenbrow, 11 N. B. R. 149; 7 Chi. Leg. News, 99; Fed. Cas. 504.

66. The United States district court has not jurisdiction to correct or annul upon appeal or petition a judgment which has been rendered in a state court, nor can it question the allegations filed in the said district court with a petition to restrain the sale of real estate for any cause that may be set forth. In re Dunn, 11 N. B. R. 270; 2 Hughes, 169; Fed. Cas. 4,172.

67. The district court, as a court of bankruptcy, is clothed with the powers of a court of equity. In re Salkey et al., 11 N. B. R. 423; 6 Biss. 269; 7 Chi. Leg. News, 178; Fed. Cas. 12,253.

68. If a party who is proceeded against by summary petition consents to a reference to a register to take proof, he thereby gives the district court jurisdiction over his person, and cannot impeach its decree in a collateral action. *People ex rel. Jennys v. Brennan*, 12 N. B. R. 567.

69. Under the bankrupt law the courts of the United States have jurisdiction of causes resulting from proceedings in bankruptcy pending in other districts. *Clafin v. Houseman*, 15 N. B. R. 49; 98 U. S. 180.

70. The petition filed did not represent the requisite number of creditors. Creditors had tried in vain to learn from bankrupt the number and amounts of his debts. The jurisdiction was sustained, it being shown that on the trial the required number had then joined. *Perin & Gaff Mfg. Co. v. Peale*, 17 N. B. R. 377; Fed. Cas. 10,981.

71. Whenever the jurisdiction of the court of bankruptcy is invoked in the manner prescribed by the act, the court is bound to assume and exercise that jurisdiction. In re Keiler et al., 18 N. B. R. 10; Fed. Cas. 7,647.

72. A petition in involuntary bankruptcy was filed alleging sufficient facts to show jurisdiction. *Held*, that the court had jurisdiction to approve a composition. In re Wronkow et al., 18 N. B. R. 81; 15 Blatchf. 88; 26 Pittsb. Leg. J. 2; Fed. Cas. 18,105.

73. The want of jurisdiction appeared on the petition, but the respondents consented to the jurisdiction. *Held*, that the court should take notice of the point of its own motion. In re Hopkins v. Carpenter et al., 18 N. B. R. 339; Fed. Cas. 6,686.

74. Complainants filed petition in Louisiana, and proposed a composition, which was confirmed. Within four months prior to commencement of bankruptcy proceedings, H. & Co., creditors of complainants and residents of New York, began attachment proceedings against them and obtained judgment. In suit by complainants in district courts to enjoin judgment, on objection to jurisdiction, the court held that district court had jurisdiction, although petition in bankruptcy was filed in another district. *McGehee et al. v. Hentz et al.*, 19 N. B. R. 136; Fed. Cas. 8,794.

75. Six months prior to bankruptcy proceedings bankrupt made a voluntary assign-

ment. Plaintiff, before filing of petition, was appointed receiver in proceedings supplementary to execution. In suit against bankrupt, assignee in bankruptcy and voluntary assignee to set aside voluntary assignment as void, it was held that, under Revised Statutes, section 4979, court had jurisdiction of suit against assignee whenever he is a proper party. *Olney, etc. v. Tanner et al.*, 19 N. B. R. 178; Fed. Cas. 10,506.

76. T., who had filed a voluntary petition in bankruptcy in the eastern district of New York, filed petition in the southern district of New York to restrain sale on execution of property of bankrupt on which sheriff had made a levy. It was held that the court had jurisdiction. *In re Tift*, 19 N. B. R. 201; Fed. Cas. 14,034.

77. On application to compel bankrupt, after discharge, to produce writings and instruments to enable assignee to recover assets of estate. It was held that the court had no jurisdiction. *In re Nichols*, 19 N. B. R. 419; Fed. Cas. 10,287.

### (3) Over State Laws and Proceedings.

78. The commencement of proceedings in bankruptcy transfers to the United States court jurisdiction over bankrupt, his estate, and all parties and questions connected therewith, and operates as *supersedeas* of process in hands of sheriff and an injunction against all other proceedings. *Jones v. Leach et al.*, 1 N. B. R. (8 vo. ed.) 595; Fed. Cas. 7,475.

79. The charter of a bank was forfeited and the corporation dissolved under the statutes of the state, and commissioners appointed to administer the assets according to the insolvent laws of the state. On petition of creditors to have the property administered upon by the bankrupt court, *held*, that the state laws were superseded by the bankrupt act and the assets were directed to be surrendered in bankruptcy. *Thornhill et al. v. The Bank of La.*, and *Williams et al. v. The Bank of La.*, 8 N. B. R. 110; 8 Amer. Law T. 38; 2 Chi. Leg. News, 157; 1 Amer. Law T. Rep. Bankr. 156; Fed. Cas. 18,090.

80. The bankruptcy court has no authority to withdraw from the state court suits pending therein between the bankrupt and

other parties, and compel their trial in the district court. *Samson v. Burton*, 4 N. B. R. 1; 5 Ben. 343; Fed. Cas. 12,285.

81. On review of motion in the United States court to appoint a receiver to take possession of property already ordered to receiver appointed in a state court, *held*, jurisdiction of two courts was concurrent; that state court first got jurisdiction, and no court of concurrent jurisdiction ought to interfere with it. *Blake v. Alabama & Chat. R. Co. et al.*, 6 N. B. R. 331; Fed. Cas. 1,493.

82. The United States court has paramount jurisdiction over state courts, and state legislation must yield to its authority in matters of bankruptcy. *In re Safe Deposit Institution*, 7 N. B. R. 393; Fed. Cas. 12,211.

83. Although a bankrupt court cannot enforce the penalties consequent upon a transaction made illegal by the usury law of a state, it can inquire into its legality when the question arises in a proceeding before it. *In re Pittock*, 8 N. B. R. 78; 2 Sawy. 416; Fed. Cas. 11,189.

84. Where congress does not prescribe the tribunal alone in which cases are to be prosecuted, the federal and state courts have concurrent jurisdiction over them. *Gilbert v. Priest*, 8 N. B. R. 159.

85. A state court has jurisdiction to entertain a suit brought by an assignee to set aside a deed executed by a bankrupt, on the ground that such deed is void by virtue of the bankrupt act. *Id.*

86. The bankrupt court has full jurisdiction to suspend suits brought in state courts against a bankrupt. *In re Davis*, 8 N. B. R. 167; Fed. Cas. 3,619.

87. As soon as insolvency exists, and the party is within the provisions of the bankruptcy law, the federal courts have exclusive jurisdiction, and a state court cannot hold assets because the state law does not purport to discharge the debtor. *In re Merchants' Ins. Co.*, 6 N. B. R. 43; 3 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

88. The state court under state laws and the federal court under bankruptcy laws have not concurrent jurisdiction, and the latter are not prevented from acting because the former has obtained jurisdiction of the parties under the state laws. *Id.*

89. Although state courts have jurisdic-

tion to settle the affairs and distribute the assets of an insolvent corporation, their jurisdiction is at an end the moment the corporation is adjudicated a bankrupt, the jurisdiction of the United States courts in bankruptcy being an exclusive jurisdiction. *Watson v. Citizens' Sav. Bank*, 11 N. B. R. 161; 2 *Hughes*, 200; *Fed. Cas.* 17,279.

90. A court of bankruptcy will respect state statutes of limitations and apply them as they are applicable. In *re Eldridge & Co.*, 12 N. B. R. 540; 2 *Hughes*, 256; 1 N. Y. *Wkly. Dig.* 243; *Fed. Cas.* 4,831.

91. Where a state court prior to the filing of a petition in bankruptcy, had acquired jurisdiction over the debtor in a suit in which a receiver was appointed, and in possession of the estate, *held*, that the jurisdiction of the federal court was exclusive, and the petition would not be dismissed. In *re Green P. R. R. Co.*, 18 N. B. R. 118; *Fed. Cas.* 5,786.

92. A state court has no jurisdiction to enforce a lien, obtained by judgment, against the proceeds of a sale of the bankrupt's goods in the hands of the assignee. The bankrupt court has exclusive jurisdiction. *Ansonia B. & C. Co. v. Pratt, Ass. etc.*, 16 N. B. R. 171.

#### (4) In General.

93. In a proceeding in bankruptcy it is necessary, in order that the court may have jurisdiction, that the petitioning creditor shall have a debt against the alleged bankrupt, provable under the act of 1867, amounting to at least \$250. In *re Hunt et al.*, 5 N. B. R. 433; *Fed. Cas.* 6,882.

94. Every court has power to amend its records so as to conform to truth, and a revisory court is bound to assume that the evidence upon which the correction was made was sufficient. *Alabama & Chat. R. Co. v. Jones*, 7 N. B. R. 145; *Fed. Cas.* 127.

95. The court might set aside a discontinuance upon proof that it was obtained by fraud, but the release could not be set aside for the reason that it was an act of settlement between the parties made privately out of court, and that by dismissal the bankruptcy court lost jurisdiction of the proceedings. In *re Bieler*, 7 N. B. R. 552; *Fed. Cas.* 1,394.

96. No court has the right to nullify a statute. *Cogdell, Ass. v. Exum*, 10 N. B. R. 329.

97. The fact that bankruptcy proceedings have been begun in the federal court against a bankrupt does not give said court exclusive jurisdiction over actions against the marshal for trespass in seizing the property of a stranger as being that of the bankrupt. *Marsh et al., Ex'rs, v. Armstrong*, 11 N. B. R. 125.

98. The correctness of the schedule of creditors or the fact whether a creditor received notice of the proceedings does not determine the question of jurisdiction either of the proceedings or to grant a discharge. In *re Archenbrow*, 11 N. B. R. 149; 7 *Chi. Leg. News*, 99; *Fed. Cas.* 504.

99. If a party assent to proceedings in the court below, taking chances of success, he will not be allowed to say, after failure, that the court below had not jurisdiction. *Mays et al. v. Fritton*, 11 N. B. R. 229; 20 *Wall.* 414.

100. The bankrupt court can refuse to grant a discharge for failure to obey an order for examination, although the order was served on the bankrupt outside of the jurisdiction of the court. In *re Hodges*, 11 N. B. R. 869; *Fed. Cas.* 6,563.

101. Objection to the jurisdiction over the person may be expressly waived, and the same thing may be done by implication, by means of any act indicating it to be the design of the person entitled to make objection, not to insist upon it. *People ex rel. Jennys v. Brennan*, 12 N. B. R. 567.

102. The jurisdiction conferred upon United States courts extends to all controversies between the bankrupt and his creditors, and to the collection, marshaling and distribution of his assets. But the jurisdiction of suits at law or in equity between the assignee in bankruptcy and any person claiming an adverse interest is conferred by a distinct provision, and is not incidental to the jurisdiction in bankruptcy. *Goodrich v. Wilson*, 14 N. B. R. 555.

103. The jurisdiction of suits by or against assignees in bankruptcy is part of the common law and equity jurisdiction of the lower United States courts, and is subject to the revision of the United States supreme court, by appeal or writ of error, and does not exclude the concurrent jurisdiction of the state courts. *Id.*

104. A court has no power to imprison a

creditor for refusing to receive money and notes tendered according to the terms of a composition. In re Hinsdale, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,524.

105. A bankrupt court, by granting leave to foreclose a mortgage in a state, does not thereby direct a sale of the property for the purpose of a valuation under section 5075, R. S. In re Herrick et al., 17 N. B. R. 835; Fed. Cas. 6,421.

### (5) Exemptions.

See EXEMPTIONS, 74.

106. When an assignee sells to a third person property in which the bankrupt had title at the time of adjudication, no other court can inquire whether such property was exempt from the assignment in bankruptcy. Steele v. Moody, 16 N. B. R. 558.

107. An order approving a report of the sales made by an assignee of property set apart for the bankrupt as exempt, filed after the time specified in the rule has expired, and approved the same day it is filed, will be revoked as irregular. A bankrupt court has power to grant relief in such cases. In re Peabody, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

108. The rights of a wife to a homestead provision out of the property of the husband is not such a lien as follows it into the hands of a third person acquiring title before any application is made to the ordinary to set the same apart, and if the husband be declared a bankrupt before the homestead is set apart, the rights of the wife are a matter for the adjudication of the bankrupt court, and the state courts have no jurisdiction. Lumpkin et al. v. Eason, 10 N. B. R. 549.

109. A creditor of the bankrupt was secured by a deed of trust on the debtor's homestead. The creditor proved his claim in bankruptcy and applied for an order to sell the property, and the property was sold. The purchaser petitioned for an order to show cause why the bankrupt should not be ordered to deliver possession. The question of the jurisdiction of the bankrupt court to order the bankrupt to deliver possession being raised, it was held that the court had jurisdiction. In re Betts, 15 N. B. R. 536; 4 Dill. 93; 7 Reporter, 522; 4 Cent. Law J. 558; 24 Pittsb. Leg. 195; Fed. Cas. 1,871.

### (6) Residence and Alien.

110. In a dispute over the ownership of a fund controlled by the assignee in bankruptcy, the district court has jurisdiction, without reference to the residence of the parties. In re Sabin, 18 N. B. R. 151; 10 Chi. Leg. News, 364; 3 Cin. Law Bul. 625; Fed. Cas. 12,195.

111. Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and they appeared, and with their own consent were so adjudged, and subsequently another creditor moved the court to dismiss on the ground that the bankrupts had never resided or carried on business in the state, *held*, that the court was without jurisdiction, and that the proceedings should be vacated. In re Fogarty et al., 4 N. B. R. 148; 5 Amer. Law Rev. 168; Fed. Cas. 4,895.

112. A court is without jurisdiction to entertain an application for discharge if the bankrupt did not reside or carry on business in the district where the petition was filed for six months immediately preceding the time of filing. In re Leighton, 5 N. B. R. 95; 4 Ben. 457; Fed. Cas. 8,221.

113. M., formerly in business in Chicago, was employed for a year and over in New York City, and lived at Elizabeth, N. J. He filed a petition to be adjudged a bankrupt, in the southern district of New York. *Held*, that the district court had no jurisdiction. In re Magie, 1 N. B. R. 138; 3 Ben. 360; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 8,951.

114. R., residing in Louisiana, being adjudged a bankrupt by the United States court for the district of Louisiana, was sued in the state courts of New York in an action of debt, and applied to the court for the southern district of that state for an injunction restraining such proceedings until the final adjudication of the bankruptcy proceedings. *Held*, that no court other than that in which the proceedings were pending had jurisdiction to award the injunction. In re Richardson, 2 N. B. R. 74; 2 Ben. 517; 2 Amer. Law T. Rep. Bankr. 20; Fed. Cas. 11,774.

115. A railroad chartered and operated in Alabama, but having offices in New York, is proceeded against in bankruptcy in the

latter state by a creditor upon proof that the company had kept offices for the next preceding six months in New York. *Held*, that the court of New York had no jurisdiction over the railroad company in bankruptcy. *In re Alabama & Chat. R. R. Co.*, 6 N. B. R. 107; 9 Blatchf. 890; 6 Amer. Law Rev. 577; Fed. Cas. 124.

116. The bankrupt court of one district has no jurisdiction in an action brought there by the assignee in bankruptcy appointed by the bankrupt court of another district where the proceedings in bankruptcy are pending. *Jobbins v. Montague*, 6 N. B. R. 509; Fed. Cas. 7,330.

117. The assignee in bankruptcy, appointed in New York, sought an injunction in New Jersey, where was situated certain property claimed to belong to the bankrupt's estate. *Held*, latter state court was without jurisdiction. *Id.*

118. The district court has no jurisdiction to sustain a bill in equity against a citizen of another state who is not found in the district and has no property there. *Paine v. Caldwell*, 6 N. B. R. 558; 5 Amer. Law T. Rep. (U. S. Cts.) 811; 29 Leg. Int. 284; 6 Alb. Law J. 291; Fed. Cas. 10,674.

119. Where the allegation in support of the jurisdiction of the court, that the parties against whom it is filed all live in the district, is found to be contrary to the facts, the court has no jurisdiction. *In re Beals et al.*, 17 N. B. R. 108; 9 Ben. 223; Fed. Cas. 1,165.

120. In involuntary proceedings the bankrupt act gives no jurisdiction over a member of a firm who resides in Canada, though the firm business be carried on in New York. *In re Burton et al.*, 17 N. B. R. 212; 9 Ben. 824; Fed. Cas. 2,214.

121. Where a party claims a part of the proceeds of a judgment and the assignee denies the claim, this is a controversy over which the circuit court has jurisdiction. The jurisdiction over controversies between an assignee and adverse claimants may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the circuit court of the district in which the decree of bankruptcy was entered. Whenever the state courts have jurisdiction over controversies between the assignee and third parties, the circuit courts have it independ-

ent of the bankrupt law, if the proper citizenship of the parties exist. *Burbank v. Bigelow et al.*, Ass., 14 N. B. R. 445; 92 U. S. 179.

122. The bankrupt law cannot be enforced as to an alien beyond the territorial limits of the United States; but for a violation of its provisions within the United States, if the courts obtain jurisdiction of the violators, they may enforce its provisions, although they be aliens. *Olcott, Ass. v. MacLean et al.*, 14 N. B. R. 379.

123. By treaty the United States agreed to pay to the British government an amount of money to indemnify British subjects for destruction of property during the civil war. Bankrupt was a British subject and had a claim for property so destroyed. It was held that the money was in a foreign country and that the bankrupt court had no jurisdiction to compel assignment. *Phelps, Ass. v. McDonald et al.*, 16 N. B. R. 217.

124. In a suit between the state of North Carolina and certain of its citizens, the court held that the United States circuit court was without jurisdiction, even under the provisions of the bankrupt act of 1867. *State of North Carolina v. Trustees of University et al.*, 5 N. B. R. 466; 1 Hughes, 133; 65 N. C. 714; Fed. Cas. 10,818.

125. A petition in bankruptcy filed in the southern district against a debtor who resides in and does business in the northern district of New York will be dismissed for want of jurisdiction. *In re Palmer*, 1 N. B. R. (8 vo. ed.) 218.

126. Where petitioner in bankruptcy had carried on business in New York and resided there for twenty years prior to June, 1866, and removed to New Jersey that year, but was still engaged by his successors in business, his petition was properly filed in New York. *In re Belcher*, 1 N. B. R. (8 vo. ed.) 666; 2 Ben. 468; Fed. Cas. 1,237. See *post*, §§ 179, 180.

## (7) Fraud.

### See FRAUD, 85.

127. The finding of a state court that a debt was one created by the defalcation of the bankrupt while acting in a fiduciary capacity is conclusive on the bankrupt court. *In re Whitney*, 18 N. B. R. 563; Fed. Cas. 17,581.

128. An assignee cannot maintain an action in the state courts to recover property transferred in fraud of the bankrupt law. The provisions of the bankrupt law voiding such transfers are penal, and the courts of one sovereignty will not take cognizance of nor enforce the penal code of another. *Bingham v. Claffin et al.*, 7 N. B. R. 412.

129. Proceedings *ex delicto* against a debtor, in a state court, on account of fraud, are not suspended by proceedings in bankruptcy, nor can the United States court restrain such proceedings. *Horter et al. v. Harlan*, 7 N. B. R. 235.

130. The district court cannot go behind a judgment of a state court and inquire into the consideration upon which it was founded. *McKinsey et al. v. Harding*, 4 N. B. R. 10; Fed. Cas. 8,866.

131. Although a court of equity would not lend its aid to a bankrupt to enforce a trust created by him for the purpose of concealing property from creditors, it would do so to his assignee for the benefit of creditors. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

132. The district court has jurisdiction in a suit in equity by the assignee to set aside conveyances alleged to be fraudulent, although the courts of law may have concurrent jurisdiction. *Pratt v. Curtis*, 6 N. B. R. 139; 2 Lowell, 87; Fed. Cas. 11,375.

133. An action was brought by an assignee to recover goods received contrary to bankrupt act, alleging that they were given to creditors as payment, and that said creditors had reasonable cause to believe that bankrupt was insolvent, and that the transfer was made in fraud of bankrupt act. The court held that right of action given to assignee by section 85 of the act of 1867, to recover property transferred contrary to such section, is within jurisdiction of the circuit court. *Brooke, Ass., v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

134. The federal courts have authority to inquire into the validity of the judgments entered in the state court, to restrain their enforcement, and, if adjudged to be fraudulent, to set them aside and decree the transfer of the property seized in execution, or the proceeds of its sale, to the bankruptcy assignee. *Zahm v. Fry et al.*, 9 N. B. R. 546; 10

Phila. 243; 31 Leg. Int. 197; 21 Pittsb. Leg. J. 155; Fed. Cas. 18,198.

135. A sale fraudulent under the bankrupt law cannot be annulled by a state court on that ground; but when such is avoided by proceedings in a bankrupt court it is the duty of a state court to enforce the decision. *Bromley v. Goodrich et al.*, 15 N. B. R. 289.

136. Assignees in bankruptcy petitioned asking that the bankrupts be ordered to pay over moneys and notes alleged to be in their possession which were a part of the estate. Held, that the court had power to make such order. *In re How et al.*, 18 N. B. R. 565; 11 Chi. Leg. News, 141; Fed. Cas. 6,747.

### (8) Contempt.

137. If it is made to appear to the court by an examination, or other manner, that the bankrupt has refused or neglected to surrender any portion of his property, he may be ordered to surrender such property, and if he fails to do so he may be punished for contempt. *In re Salkey et al.*, 11 N. B. R. 423; 6 Biss. 269; 7 Chi. Leg. News, 178; Fed. Cas. 12,253.

138. A bankruptcy court has jurisdiction, after an adjudication of bankruptcy, and before the appointment of an assignee, to grant, upon the petition of creditors, an injunction restraining attaching creditors from further proceeding against the property which they have attached, and may also punish for contempt the attaching creditors who disregard such order. *In re Ulrich et al.*, 8 N. B. R. 15; 6 Ben. 483; Fed. Cas. 14,328.

139. The district court has no jurisdiction over a state court, but it has complete original jurisdiction of the bankrupt, and all his assets and his creditors, and may fine and imprison any of said creditors for interfering with the assets, in a state court, without permission of the district court. *In re Winn*, 1 N. B. R. 181; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

### (b) Liens.

See LIEN, 2.

### (1) In General.

140. A judgment creditor cannot claim the jurisdiction of the court in bankruptcy

for the collection of his debt fully secured by the only lien on real estate. *In re Johann*, 4 N. B. R. 148; 2 Biss. 189; Fed. Cas. 7,831.

141. Where money was deposited in court to the credit of a person against whom a warrant for adjudication of bankruptcy had been issued, and the funds had thereby been lodged in court without prejudice to the rights of creditors or of a mortgagee, the legal intentment would be that the rights of the assignee and of the mortgagee should be adjudicated according to the usage of the court. *In re Masterson*, 4 N. B. R. 180; Fed. Cas. 9,268.

142. A bankrupt court has jurisdiction to enforce a lien against the purchaser of property sold by an assignee, subject to such lien. The jurisdiction of the bankrupt court extends "to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of proceedings in bankruptcy." *Bucknam v. Dunn et al.*, 16 N. B. R. 470; 2 Hask. 215; Fed. Cas. 2,096.

143. A purchaser at a sale by an assignee bought property subject to a lien. In an action by the lien creditor to recover from the purchaser the amount of his debt, the court held that the bankrupt court had jurisdiction to enforce such action. *Id.*

144. When a party appears and moves for the enforcement of a pretended lien, the district court thereby acquires jurisdiction to proceed and dispose of the whole matter. *In re Worthington*, 14 N. B. R. 388; 3 Cent. Law J. 526; 8 Chi. Leg. News, 362; 14 Alb. Law J. 153; Fed. Cas. 18,052.

145. The United States district court, having cognizance of all controversies between a bankrupt and his creditors, has the same power to restrain creditors with judgments against a bankrupt that a state court of equity would have over such creditors if the debtor were not a bankrupt. *Fowler, Ass. v. Dillon et al.*, 12 N. B. R. 308; 1 Hughes, 232; Fed. Cas. 5,000.

146. The power to reduce the amount of judgments at law rendered on Confederate contracts to the equivalent in legal money is an equitable power belonging to state courts of equity, and may be exercised in cases where bankrupts are parties defendant by the United States district courts. *Id.*

147. When, under the state law, a creditor acquires a lien on the property of a debtor upon docketing a judgment, if the docket entry is ambiguous, no lien arises in favor of the judgment creditor as against the assignee in bankruptcy. *In re Boyd*, 16 N. B. R. 187; 4 Sawy. 262; 9 Chi. Leg. News, 885; 10 Chi. Leg. News, 1; 4 Law & Eq. Rep. 488; 6 Amer. Law Rec. 311; Fed. Cas. 1,746.

## (2) Sale.

148. If an injunction has been issued out of the circuit court under the equitable jurisdiction auxiliary to that of the district court in bankruptcy, the execution creditor may require the assignee to proceed in the circuit court in equity or invoke the jurisdiction of the court of bankruptcy for a decision of the question of priority. *In re Hafer et al.*, 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 164; Fed. Cas. 5,897.

149. A court of bankruptcy has power to order the sale of the incumbered property of the bankrupt, and the money arising from the sale to be distributed among the creditors holding the securities. *In re Salmons*, 2 N. B. R. 19; 15 Pittsb. Leg. J. (O. S.) 541; Fed. Cas. 12,268.

150. The circuit court has jurisdiction to entertain a petition for relief from orders of the district court directing that bankrupt's land shall be sold, and that the holder of the first lien, a deed of trust, shall be purchaser, the trust bond to be accepted in part payment. *In re Alexander*, 3 N. B. R. 6; Chase, 295; 8 Amer. Law Reg. (U. S.) 423; 2 Amer. Law T. Rep. Bankr. 81; 16 Pittsb. Leg. J. 91; 2 Balt. Law Trans. 759; Fed. Cas. 160.

151. The bankrupt court has authority to order the sale of property pledged or mortgaged by a bankrupt, the proceeds to be brought into court to await the determination of the rights of the pledgee or mortgagee. *In re The Columbian Metal Works*, 3 N. B. R. 18; Fed. Cas. 3,039.

152. B., who held a chattel mortgage against C., petitioned to have the court declare it a valid and subsisting lien, and to decree the assignee to deliver mortgaged property to B. Assignee objected as to jurisdiction of bankruptcy court until mortgagee should prove his debt against the estate. *Held*, district court had jurisdiction to hear



and determine question of lien. In re High et al., 8 N. B. R. 46; 2 Amer. Law T. 170; 2 Chi. Leg. News, 9; 16 Pittsb. Leg. J. 193; 1 Amer. Law T. Rep. Bankr. 175; Fed. Cas. 6,473.

153. The district court has jurisdiction to liquidate all liens upon the bankrupt's property, and may enjoin a creditor from enforcing a judgment in a state court; but after the process of the state court has been executed by a sale of property, the district court will not interfere. In re Fuller, 4 N. B. R. 29; 18 Pittsb. Leg. 83; 2 Chi. Leg. News, 373; Fed. Cas. 5,148.

154. By virtue of the bankrupt act of 1867 the bankruptcy court has the right to take possession of and sell mortgaged property, free from the lien of the mortgage, without first satisfying it. In re Kahley, 4 N. B. R. 124; 2 Biss. 383; 3 Chi. Leg. News, 85; Fed. Cas. 7,593.

155. The circuit court will entertain a bill by assignee in bankruptcy against several mortgagors and other lien holders to ascertain the amount due, and sell the property free from incumbrances. Sutherland et al., Lake Sup. S. C., R. R. & I. Co., 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

156. A creditor holding a mortgage as security proved his claim in bankruptcy, and an order was made by the court, upon a prior lienor's application, permitting the latter to sell the premises and directing that the proceeds thereof, above the sum admitted to be due on the prior lien, await the order of the court upon the hearing between the claimants of the fund. *Held*, from the nature of the jurisdiction which has attached, it must be exclusive. Levy v. Haake et al., 18 N. B. R. 544.

### (3) Of Execution.

157. The bankruptcy court may prohibit creditors of the bankrupt from taking out execution in a state court, and levying it on attached property, until the assignee shall have time to discharge the attachment liens. Samson v. Burton, 4 N. B. R. 1; 5 Ben. 343; Fed. Cas. 12,285.

158. No lien can be enforced by any proceeding in a state court commenced after petition in bankruptcy is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought to

enforce a valid lien upon property, such jurisdiction will not be divested. In re Wynne, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

159. A district court in bankruptcy may restrain sale of bankrupt's property on process of state court levied before bankruptcy proceedings. Beattie v. Gardner et al., 4 N. B. R. 106; 4 Ben. 479; Fed. Cas. 1,195.

160. The court can restrain the sale of a debtor's land under a judgment of the state court, as the lien existing thereby must be enforced through the bankrupt court. In re Lady B. M. Co., 6 N. B. R. 252; Fed. Cas. 7,980.

161. Subsequent to the filing of the petition in bankruptcy judgment was given in the state court against the property of the bankrupt. The assignee did not appear to defend the suit there. *Held*, judgment was void and there was no lien. Assignee not bound thereby. Stuart v. Hines, 6 N. B. R. 416.

162. The United States district court was petitioned to order the sheriff to deliver property obtained by virtue of an execution issued upon a judgment of state court to the assignee. The court held that the lien being *prima facie* valid, the court had no such authority until satisfaction of the judgment, or until the writ is set aside for fraud or violation of the act. In re Shuey, 9 N. B. R. 526; 6 Chi. Leg. News, 248; Fed. Cas. 12,321.

163. A state court may entertain an action by an assignee to recover money received by a creditor as a preference. If money be brought into a state court under a *fi. fa.* the assignee may intervene and claim the fund on the ground that the levy is void under the bankrupt act. Jordan, Ass., v. Downey, 12 N. B. R. 427.

164. The executor of a judgment creditor moved in the state court for an execution. The debtor had been discharged in bankruptcy between the date of the judgment and the motion, and the creditor had not proved in bankruptcy, although the claim was scheduled and notice sent. Plaintiff claimed that the judgment roll created a lien which the bankruptcy proceedings did not dissolve, and that he was entitled to enforce the lien. *Held*, that the bankrupt act did not divest the lien, but the bankrupt court was the only tribunal to administer

the remedy for the enforcement of the lien. *Blum, Ex'r, v. Ellis*, 13 N. B. R. 345.

165. The lien of an attachment, or the lien of a creditor upon property conveyed in fraud of creditors, or the lien of a partner upon partnership funds, may be enforced in other courts, where proceedings have been instituted before the commencement of bankruptcy proceedings. Having obtained jurisdiction over the parties and subject-matter, they have the right to determine all questions as they arise, subject to the judgment of the United States supreme court, in case any right is set up under any statute of the United States and such right is denied to them. *Mason et al. v. Warthen*, 14 N. B. R. 346.

166. On motion in a state court, an attachment issued within four months before the beginning of bankruptcy proceedings will be dissolved, although judgment has been entered and proceeds of sale paid to plaintiff by the sheriff. *Dickerson v. Spaulding et al., Ass.*, 15 N. B. R. 313.

#### (4) Made Available.

167. When the bankruptcy court has acquired jurisdiction of the estate of a bankrupt, the state courts lose jurisdiction of claims against him provable under the act, except specific liens upon his property and legal or equitable claims of title thereto; and the homestead and exemption provisions of the constitution of 1868 of Georgia do not create such a specific lien upon, or title to, his estate, in favor of his family, as may be adjudicated by the state court pending the proceedings in bankruptcy. *Woolfolk v. Murray, Bryan v. Sims*, 10 N. B. R. 540; *Fed. Cas.* 18,028.

168. Where no action has been taken by the assignee, or creditor, to deal with the property in the bankrupt court, the state court has jurisdiction to make the lien available. *Reed v. Bullington*, 11 N. B. R. 408.

169. A judgment having been obtained against an assignee of a bankrupt in a state court, the party in whose favor the judgment was rendered petitioned the court in bankruptcy for the countersigning of a check for the amount of the judgment. *Held*, the judgment was in excess of the jurisdiction of a state court. *In re Cent. Bank*, 12 N. B. R.

286; 8 Ben. 114; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 55; *Fed. Cas.* 2,549.

#### (c) *Partners.*

See PARTNERSHIP, 84.

170. On suit in Ohio on notes executed by a firm in Ohio, and a plea to jurisdiction on ground that the domicile and place of business of the firm was in Michigan only, the court held that the court of Michigan only had jurisdiction. *Cameron v. Canio & Co.*, 9 N. B. R. 527; *Fed. Cas.* 2,340.

171. The widow of a former resident of New Orleans filed suit against B., a resident of Wisconsin, asking for an accounting as to the proceeds of a judgment claimed to be partnership assets. The defendant was duly served in New Orleans and filed an answer. Shortly before the filing of the bill the defendant filed a petition in bankruptcy, and after the filing of the bill an assignment was made. During the progress of the cause a receiver was appointed by the court, who collected the amount due on the judgment. The court below dismissed the bill for want of jurisdiction. On appeal the decree was reversed. *Burbank v. Bigelow et al.*, 14 N. B. R. 445; 92 U. S. 179.

172. Whenever it is within the province of the bankrupt law to bring the debts of the partnership, or its credits, within the control of the court, there can be an adjudication in bankruptcy. The mere dissolution of the firm does not put an end to the power of said court. *In re Noonan*, 10 N. B. R. 330; 5 Chi. Leg. News, 557; 30 Leg. Int. 425; 21 Pittsb. Leg. J. 73; *Fed. Cas.* 10,292.

173. Bankrupt was adjudicated upon creditor's petition. Petition was subsequently filed by bankrupt and assignee, alleging that at time of filing creditor's petition bankrupt was member of firm which had debts exceeding \$300, and assets to be administered, and prayed that other members might be brought in and firm adjudicated. The court held that relief was within power of court. *In re Kelley*, 19 N. B. R. 826; *Fed. Cas.* 7,656.

174. Original petition was signed by partners of defendant. Intervening petitions, sufficient to constitute quorum, were afterwards filed. The court held that original petition did not give court jurisdiction, and

intervening petitions were also void. *Robinson et al. v. Hanway*, 19 N. B. R. 289; 27 Pittsb. Leg. J. 21; Fed. Cas. 11,958.

175. When property is lawfully placed in the custody of a receiver by the court which appoints such receiver, no other court has a right to interfere with such possession unless it be a court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. In *re Clark et al.*, 3 N. B. R. 130; 4 Ben. 88; Fed. Cas. 2,798.

176. One partner brought action in state court against the other for a winding up of the partnership. The court appointed receivers, who took possession of the firm's property. The firm was subsequently adjudged bankrupt and assignee was appointed, who made application for an order directing the marshal to take possession of the property in the hands of the receiver. *Held*, that the bankrupt court had no right to interfere with possession of the receivers. *Id.*

177. The court has jurisdiction of a petition filed by two members of a firm which originally consisted of three. In *re Mitchell et al.*, 3 N. B. R. 111; Fed. Cas. 9,656.

178. A and B, partners, were sued individually by B, but B. having become a non-resident of the state, C. caused an attachment to be issued against him. A. owed B. money, but having been declared a bankrupt by the United States district court, C. garnished the assignee. *Held*, that court had no jurisdiction, but that a receiver of B.'s effects should be appointed, who, representing B. in the bankruptcy distribution, would receive from A.'s assignee all moneys coming to B., and then account to the state for them. *Jackson v. Miller et al.*, 9 N. B. R. 143.

179. A member of a firm residing in one state and doing business in another may have proceedings in the district of his domicile stayed, and have jurisdiction allowed to the court of the district in which the joint business is carried on, and in which his partner resides, against whom proceedings have also been instituted. In *re Smith*, 3 N. B. R. 15.

180. Section 86 of the act of 1867, which provides that in case of bankrupt partners, if such copartners reside in different districts, the court in which the petition is first filed shall retain exclusive jurisdiction of the case, gives the court no jurisdiction until he shall

have filed his petition for adjudication in the district where he resides. In *re Prankard et al.*, 1 N. B. R. 51; Fed. Cas. 11,866.

181. One partner brought action in state court against the other for winding up of the partnership. The court appointed receivers, who took possession of the firm's property. The firm was subsequently adjudged bankrupt and an assignee was appointed, who made application for an order directing the marshal to take possession of the joint property. *Held*, that the bankrupt court had no right to interfere with the possession of the receivers. In *re Clark et al.*, 3 N. B. R. 123, 130; 4 Ben. 88; Fed. Cas. 2,798.

#### (d) Bonds.

182. Goods seized by marshal were released upon bond given for production of property. The court held that it could order parties to the bond to bring into court the property or its value. *Rosenbaum v. Garnett, Ass. etc.*, 19 N. B. R. 370; 8 Hughes, 662; Fed. Cas. 12,053.

#### (e) State Courts.

##### (1) Suits.

##### (a) By Assignee (Trustee).

See ATTACHMENT, 23, 52; COLLATERAL ATTACK, 14; EXEMPTIONS, 70; PARTNERSHIP, 129; PLEADING AND PRACTICE, 203; PREFERENCES, 101; TRUSTEE, 165, 178, 196.

183. A state court has jurisdiction in an action brought by an assignee, where the equity sought is such as is recognized by the laws of the state in which the action is brought, and not the creature of the bankrupt act. *Voorhees v. Frisbie*, 8 N. B. R. 152.

184. Assignee filed a bill in a state court to set aside a conveyance alleged to have been made in violation of the bankrupt act. *Held*, that the court had no jurisdiction. *Id.*

185. A state court passing upon claims of assignees is not proceeding under the bankrupt act, but simply recognizes that act as the source of the assignee's title, in like manner as if such title was derived from a contract. *Cook v. Waters et al.*, 9 N. B. R. 155.

186. When an assignee in bankruptcy submits himself to the jurisdiction of a state

court, he cannot after judgment object to the power of such court, and a federal court cannot assume jurisdiction. *Scott et al. v. Kelly*, 12 N. B. R. 96; 22 Wall. 57.

187. A state court may entertain an action by an assignee to recover property disposed of by the bankrupt in fraud of the bankrupt act. *Dambmann v. White et al.*, 12 N. B. R. 438.

188. A state court has jurisdiction of an action brought by an assignee to recover money paid to a creditor as a preference. *Goodrich v. Wilson*, 14 N. B. R. 555.

189. An assignee brought an action to recover money paid to a creditor as a preference, in the New York supreme court. The defendant demurred on the ground that the court had no jurisdiction. The court held that a state court has jurisdiction. *Claffin v. Houseman*, 15 N. B. R. 49; 93 U. S. 130.

190. An assignee bringing an action to collect a debt due to the estate may select the forum, and a state court would have jurisdiction. *Russell, Ass. etc., v. Owen*, 15 N. B. R. 322.

191. An assignee in bankruptcy may maintain a suit in a state court. *Wente v. Young et al.*, 17 N. B. R. 90.

192. An assignee in bankruptcy may not sue in a state court for a sum exceeding \$500 (act of 1867). *Halleck et al. v. Tritch, Ass.*, 17 N. B. R. 298; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

193. An action was brought by an assignee in bankruptcy against the acceptor of a draft which came to the hands of the assignee as part of the bankrupt estate. The defendant claimed that the state courts had no jurisdiction of an action by an assignee in bankruptcy to recover a debt owing to the bankrupt, under the act of 1867, as amended in 1874. *Held*, that the court had jurisdiction. *Kidder, Ass. v. Horriben et al.*, 18 N. B. R. 146.

#### (b) Against Assignee (Trustee).

194. The maker of a note brought action in a state court against the assignee of the payee to enjoin him from commencing action for the collection of the note. The court held that the state court had no jurisdiction. *Southern et al. v. Fisher, Tr.*, 16 N. B. R. 414.

195. A state court may entertain an ac-

tion against an assignee for the tortious taking of property not in possession of the bankrupt and belonging to a stranger. *Leighton v. Harwood*, 12 N. B. R. 860.

#### (2) Acts.

##### (a) Within Jurisdiction.

196. Where a suit has been brought on a note in a state court, it is not for a bankrupt court to try the question of the liability of the debtor on the note, and adjudge that there was a suspension of payment of his commercial paper, if such liability existed (act of 1867). The proper forum for the determination of the question is the court in which the suit on the note is pending. In *re Mannheim*, 7 N. B. R. 342; 6 Ben. 270; 5 Chi. Leg. News, 149; Fed. Cas. 9,088.

197. The state court has jurisdiction over all subjects arising out of the question whether the debt in litigation is, or not, embraced in the class of liabilities from which the debtor is absolved, and upon which his discharge has no effect. *Stevens v. Brown*, 11 N. B. R. 568.

198. The jurisdiction of the court to pass upon a question is a very different thing from the correctness in point of law of the determination. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

199. Where jurisdiction is shown to have attached, the subsequent proceedings of a court of limited jurisdiction are presumed to be as regular as those of a court of general jurisdiction, and its decision upon every question arising in the case is binding until reversed on appeal. *Id.*

200. Where acts are done by state courts in the exercise of their jurisdiction which do not conflict with the jurisdiction of federal courts, such acts are valid and bind the federal courts. In *re Keiler et al.*, 18 N. B. R. 10; Fed. Cas. 7,647.

##### (b) Not Within Jurisdiction.

201. A bankrupt's discharge cannot be impeached in a state court for any of the reasons which would prevent the United States court from granting it. *Alston v. Robinett*, 9 N. B. R. 74.

202. A state court cannot review the de-

eision of a United States district court. *Maxwell v. McCune et al.*, 10 N. B. R. 306.

203. A state court has no authority to order a bank, in which funds belonging to a bankrupt's estate are deposited, to pay a judgment rendered against the assignee. *Havens v. Bank*, 13 N. B. R. 95.

204. The court in which an action is pending against a bankrupt has no authority to compel the assignee to become a party. *Serra et al. v. Hoffman & Co.*, 17 N. B. R. 124.

### (3) Laws.

#### (a) Affecting Jurisdiction.

205. The bankrupt act is the law of the state courts, and if by virtue of that act the state court has no jurisdiction in an action, it will so decide upon proper plea. In re *The Central Bank*, 6 N. B. R. 207; *Fed. Cas.* 2,547.

206. The state courts are bound to take judicial notice of the federal courts, and it is also supposed that they will know something of the laws of congress, though not generally called on to administer them. *Morris et al. v. Swartz*, 10 N. B. R. 305.

#### (b) Not Affecting Jurisdiction.

207. Congress cannot impose upon state courts any duties in connection with the enforcement of the bankrupt laws. *Goodall v. Tuttle*, 7 N. B. R. 193; 3 Biss. 219; 5 Amer. Law T. Rep. (U. S. Cts.) 240; 7 West. Jur. 32; 4 Chi. Leg. News, 473, 485; *Fed. Cas.* 5,533.

208. Congress cannot compel a state court to entertain jurisdiction in any case; it is optional with them in all cases whether to entertain any jurisdiction or not; they are left to consult their own state authority. *Shearman v. Bingham et al.*, 7 N. B. R. 490.

209. Criminal jurisdiction cannot be conferred upon state courts by an act of congress, and they are not bound to exercise jurisdiction even in civil cases, but may decline to do so if they see fit, or if the laws of the state forbid it. *Id.*

210. The bankrupt act does not divest the states of power to pass laws for winding up the estates of insolvent corporations. The jurisdiction conferred upon the bankrupt court is superior but not exclusive. *Chandler v. Siddle*, 10 N. B. R. 236; 3 Dill. 477; *Fed. Cas.* 2,594.

### (4) Effect of Bankruptcy Proceedings.

211. Proceedings in an action in a state court will not be stayed on the ground that the plaintiffs have taken proceedings to have defendants declared involuntary bankrupts. *Maxwell v. Faxton*, 4 N. B. R. 60.

212. Section 2 of the act of 1867, while conferring on the district and circuit courts jurisdiction of certain actions, does not thereby oust the jurisdiction of the state courts. In re *Central Bank*, 6 N. B. R. 207; *Fed. Cas.* 2,547.

213. One of three partners of a firm dying, left a will permitting his interest in the co-partnership to be continued. The surviving partners declining to give the bond necessary for them to retain possession of the partnership estate, the administrator of the deceased gave the required bond, and proceeded to administer the estate according to the state law. Upon petition of a creditor to put the firm into bankruptcy, *held*, that the jurisdiction of the probate court should not be interfered with. In re *Daggett*, 8 N. B. R. 433; *Fed. Cas.* 3,536.

214. The plea of bankruptcy interposed in the state court to recover damages for wrongful conversion of personal property is a complete bar to the suit. *Cole v. Roach*, 10 N. B. R. 238.

215. Where proceedings have been begun in bankruptcy it would perhaps be the proper course for the bankrupt court to issue a writ of *habeas corpus* if action should be taken in a state court, and thus secure the bankrupt from arrest under the proceedings in the state court. In re *Williams et al.*, 11 N. B. R. 145; 6 Biss. 233; 7 Chi. Leg. News, 49; *Fed. Cas.* 17,700.

216. State courts are not divested of their jurisdiction of cases pending in them by bankruptcy proceedings against one party unless it be brought to the notice of the state court by appropriate proceedings. *Bracken v. Johnston*, 15 N. B. R. 106; 4 Dill. 518; 5 Amer. Law Rec. 461; 4 Cent. Law J. 9; 11 Amer. Law Rev. 609; 3 N. Y. Wkly. Dig. 573; 1 Cin. Law Bul. 353; *Fed. Cas.* 1,761.

217. To affect the jurisdiction of state courts over pending actions the adjudication or discharge must be pleaded. *Serra et al. v. Hoffman & Co.*, 17 N. B. R. 124.

## (5) In General.

218. The property of a bankrupt, though situated in another state and though mortgaged by the bankrupt prior to the institution of proceedings against him, is within the jurisdiction of the court in which the adjudication of bankruptcy was made. *Markson et al. v. Heaney*, 4 N. B. R. 165; 8 Chi. Leg. News, 153; Fed. Cas. 9,098.

219. A foreclosure sale in a state court by permission of the bankrupt court cannot afterwards be set aside by an assignee, and purchaser at such sale will be compelled to take title. *Lenihan v. Harman et al.*, 8 N. B. R. 557.

220. New York state court will not enforce a right acquired under foreign bankrupt laws or foreign bankrupt proceedings so far as affects property within their jurisdiction or demands against residents of the state. *Mosselman et al., Tr., v. Caen*, 10 N. B. R. 512.

221. Where a court takes possession of property and places it in hands of a receiver, the rights of parties are not thereby affected. The receiver holds for the legal owner. *Miller v. Bowles*, 10 N. B. R. 515.

222. If a debtor apply for the benefit of a state insolvent law, and the court dismiss the case for want of jurisdiction, this is a conclusive answer to an action on a bond conditioned to apply for the benefit of the state insolvent laws. *Hubert v. Horter*, 14 N. B. R. 430.

223. A trustee in bankruptcy brought suit in a New York state court to recover realty claimed to be fraudulently conveyed. The proceedings were stayed for some while. In the interim the Revised Statutes came into force. It was then held on demurrer that the state court was thereby deprived of jurisdiction. *Frost v. Hotchkiss*, 14 N. B. R. 4,443.

224. Sheriff sold perishable goods under attachment and by order of a state court before, but without notice of, the adjudication of defendant in bankruptcy. The court held he was guilty of a conversion. *Long, Ass., v. Conner*, 17 N. B. R. 540; Fed. Cas. 8,479.

## (6) Mortgage Foreclosure.

See MORTGAGES, 67, 75, 83.

225. The bankrupt court has no authority, where property is sold free from a mort-

gage, to adjust the trustee's claims under the mortgage against the *cestui que trust*, nor to ascertain what is due to his counsel. *In re Blue R. R. Co.*, 13 N. B. R. 315; 3 Hughes, 224; 8 Chi. Leg. News, 290; 4 Amer. Law Rec. 456; Fed. Cas. 1,570.

226. If an assignee and general creditors voluntarily abandon their claim to incumbered property, the state courts may subject such property to the satisfaction of the secured creditor's claims, and afford him any relief that he would be entitled to if proceedings in bankruptcy had not been instituted. *Second Nat. Bank v. Nat. S. Bank*, 11 N. B. R. 49.

227. A bankrupt court does not acquire such jurisdiction over the bankrupt's property, from an adjudication in bankruptcy, as would prevent a foreclosure on a bill filed before adjudication. *Jerome et al., Ass., v. McCarter*, 15 N. B. R. 546; 94 U. S. 734.

228. A creditor whose debt against bankrupt was secured by mortgages proceeded, with leave of the bankrupt court, to foreclose the mortgage in a state court. The bankrupt and his wife objected. The court held that the jurisdiction of the state court was not divested. *McHenry et al. v. La Soc. Fr.*, 16 N. B. R. 385; 95 U. S. 58.

229. In an action by an assignee in bankruptcy in the supreme court of Illinois to set aside a mortgage executed by a bankrupt, the court held that a state court may inquire into the jurisdiction of the bankrupt court. *Issett v. Stuart*, 16 N. B. R. 191.

230. Where a bankrupt court orders a sale of mortgaged property, a state court has no jurisdiction to foreclose the mortgage. *In re Devore*, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

231. In an action brought by an assignee in bankruptcy to foreclose a mortgage a state court has jurisdiction. *Burlingame, Ass. etc., v. Parce et al.*, 17 N. B. R. 246.

232. The mere filing of a petition in involuntary bankruptcy does not divest the jurisdiction of a state court over an action to foreclose a mortgage. *In re Irving et al.*, 14 N. B. R. 289; 8 Ben. 463; 2 N. Y. Wkly. Dig. 500; R. S. 5024; Fed. Cas. 7,073.

233. A bankruptcy court has jurisdiction to award an injunction upon the petition of the assignee, restraining proceedings in a state court commenced after the adjudication for the appointment of a receiver and

foreclosure of a mortgage until the validity of the mortgage is determined. In re Kerosene Oil Co., 2 N. B. R. 164; 3 Ben. 35; 2 Amer. Law T. Rep. Bankr. 79; Fed. Cas. 7,725.

234. The circuit or district court of the district in which the proceedings are pending, and only such courts, can enjoin the prosecution of a suit in a state court of another state commenced after proceedings are instituted; and a circuit court of one district, in a suit by an assignee appointed by a district court in another state, cannot enjoin a suit to foreclose a mortgage in the state court of a third state. Markson et al. v. Heaney, 4 N. B. R. 165; 3 Chi. Leg. News, 153; Fed. Cas. 9,098.

235. United States courts have exclusive jurisdiction over all proceedings relating to the estate of a bankrupt. Therefore foreclosure proceedings brought in a state court to enforce a mortgage upon property of a person adjudicated a bankrupt are void, unless brought with consent of the bankrupt court. In re Brinkman, 7 N. B. R. 421; Fed. Cas. 1,884.

#### (f) *Wife's Rights.*

236. A bankrupt court has no jurisdiction to review in any way the decree of a state court granting alimony to bankrupt's wife. The monthly payments falling due after bankruptcy are due by natural obligation and not by contract, and they are not affected by discharge. In re Garrett, 11 N. B. R. 498; 2 Hughes, 235; Fed. Cas. 5,252.

237. A bankrupt had owned an equity in a lot of land. His wife had used money of her separate estate to erect a house on it with an agreement that a conveyance should be made to the wife. On the wife's coming voluntarily into the bankruptcy court it was held the court had jurisdiction and could grant equitable relief to the wife. In re Campbell, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

238. Order and subpoena for the wife of the bankrupt to appear was issued, and in explanation of her failure to obey, the right of the court to compel her attendance was denied. Held, that the court had power to compel attendance, and an order to show cause why a warrant should not issue was

the proper proceeding. In re Bellis et al., 8 N. B. R. 65; 38 How. Pr. 88; 1 Amer. Law T. Rep. Bankr. 178; Fed. Cas. 1,276.

#### (g) *Debts and Assets.*

239. Where collaterals are pledged as security for debts, a bankruptcy court must rule as a court of equity unless it is a void preference under section 35 of the act of 1867. In re Peebles, 13 N. B. R. 149; 2 Hughes, 394; Fed. Cas. 10,903.

240. The receipt and filing of proof of debt alone confers jurisdiction over a claim, and then only does its revising power over such proof commence. In re Merrick, 7 N. B. R. 459; Fed. Cas. 9,468.

241. When the legislative power conferred upon congress by the constitution to "establish uniform laws upon the subject of bankruptcies throughout the United States" has been exercised, it is exclusive and suspends the insolvency laws of the state; and the fact that the assets of an insolvent are not sufficient to pay fifty per cent. of his debts, and that a majority of his creditors will not consent to his discharge, does not remove a case from the operation of the act (1867). Nostrand v. Barr, 2 N. B. R. 154.

242. The distribution of the assets of a bankrupt cannot be interfered with by garnishment or any other process of a state court. In re Bridgman, 2 N. B. R. 84; 1 Chi. Leg. News, 103; Fed. Cas. 1,867.

243. Decision of Marshall v. Knox, 8 N. B. R. 89, denying the power of the district court to invade the jurisdiction of a state tribunal, where property is in its custody under proceedings commenced prior to the bankruptcy, does not deny the power of the circuit court to order all matters pending therein to be adjudicated in an original suit, subsequently commenced by an assignee in bankruptcy. Sutherland et al. v. Lake Sup. S. C., R. & I. Co., 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

244. The commencement of proceedings in bankruptcy at once transfers to the district court jurisdiction over the bankrupt, his estate and all parties and questions connected therewith. In re Carow, 4 N. B. R. 178; 41 How. Pr. 112; Fed. Cas. 2,426.

245. The decision of a district court, upon

an application to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction conferred by the bankrupt law of 1867 upon the circuit courts. *In re York et al.*, 4 N. B. R. 156; 10 Amer. Law Reg. (N. S.) 36; Fed. Cas. 18,139.

246. The circuit court has no supervisory jurisdiction of a suit brought by the assignee or a creditor pending the bankruptcy proceedings, or on the rejection or allowance of a claim, but has such jurisdiction in all other cases (act of 1867). *Id.*

247. When assignees under an assignment for the benefit of creditors have been enjoined from interfering with the property conveyed by such assignment, and are made defendants to a bill by the assignee in bankruptcy, it is proper to appoint a receiver of the assigned estate pending the suit. *Sedgwick, Ass., v. Place et al.*, 8 N. B. R. 35; 3 Ben. 360; Fed. Cas. 12,619.

248. A district court has no jurisdiction to order summarily the delivery to an assignee of goods of a lessee seized by the sheriff under a writ, obtained by the lessor prior to proceedings in bankruptcy. *Marshall v. Knox et al.*, 8 N. B. R. 97; 16 Wall. 551.

249. The bankrupt court, by reason of its exclusive jurisdiction in matters of bankruptcy, has the right to take possession of the estate of the bankrupt however situated or incumbered. *In re Dillard*, 9 N. B. R. 8; 2 Hughes, 190; 6 Amer. Law T. Rep. 490; 21 Pittsb. Leg. J. 82; Fed. Cas. 3,912.

250. Where, under the twentieth section, the value of a security is agreed upon between the assignee and a creditor, and after such valuation new facts are developed, to show the valuation to have been erroneous, the court will order a new valuation to be made (act of 1867). *In re Newland*, 9 N. B. R. 62; 7 Ben. 63; 2 Ins. Law J. 800, 895; 4 Big. Ins. Cas. 283; Fed. Cas. 10,171.

251. On the bankruptcy of the pledgor of stock pledged to secure call loans, the pledgee petitioned for leave of the court to sell said stock and pay the surplus into court. *Held*, leave not necessary. *In re Grinnell*, 9 N. B. R. 137; Fed. Cas. 5,829.

252. The property of a bankrupt, of every description, vests by the operation of the bankrupt law in the adjudicating bankrupt court, and remains in its custody, and exempt from interference by any state court

or person, except by permission of said bankrupt court. *Lockett v. Hoge*, 9 N. B. R. 167; Fed. Cas. 8,444.

253. Circuit courts have concurrent jurisdiction with the district courts of all suits at law or in equity which may be brought by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any rights of property of said bankrupt, vested in the assignee, if suit at law or bill in equity be brought within two years after action accrues. *Knight v. Cheney*, 5 N. B. R. 305; Fed. Cas. 7,883.

254. A United States district court of a district other than that in which proceedings are pending has not jurisdiction under which an assignee can commence an action for the recovery of assets, and such suit will be dismissed for want of jurisdiction. *Lamb v. Damron*, 7 N. B. R. 509; 5 Chi. Leg. News, 290; Fed. Cas. 8,014.

255. Where a usurious contract is executed, a court of chancery, on application of the debtor, will only assist him to recover the excess paid over the legal interest; but if executory, no relief will be afforded unless the lender is paid principal and legal interest. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

256. The concurrent jurisdiction conferred upon the circuit court by the act of 1867 is limited to cases which involve the adjustment of claims to specific property, and does not extend to actions to collect simple debts. *Bachman, Ass., v. Packard*, 7 N. B. R. 353; 2 Sawy. 264; 4 Pac. Law Rep. 193; Fed. Cas. 709.

257. An assignee in bankruptcy brought suit in United States circuit court to collect a debt due the bankrupt. *Held*, that the district court alone had original jurisdiction. *Id.*

258. State courts are not divested of jurisdiction of actions involving the right to real or personal property of the bankrupt, or debts owing to his estate, by operation of the bankrupt act. *Eyster v. Gaff et al.*, 13 N. B. R. 546; 91 U. S. 521.

### (h) Corporations.

See CORPORATIONS, 81.

259. The dissolution by a state court of a corporation before the adjudication in bankruptcy, but after service of the order to show cause, does not deprive the bankrupt court.



of jurisdiction. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,213.

260. A depositor in a savings bank, which was soon after adjudged bankrupt, filed a bill to have the bank wound up under the state laws, and the bankrupt court enjoins the state court proceedings, though the latter were commenced prior to the filing of petition. *Held*, bankrupt court had jurisdiction. *In re Citizens' Sav. Bank*, 9 N. B. R. 152; Fed. Cas. 2,735.

261. Although a corporation has been dissolved by decree of a state court, it still exists for the purpose of settling debts, etc., and the courts of bankruptcy have jurisdiction over it. *In re Independent Ins. Co.*, 6 N. B. R. 169; 2 Lowell, 97; Fed. Cas. 7,018.

262. Where a district court, in which a corporation was declared bankrupt, directed an assessment on the unpaid stock of said bankrupt, *held*, that such assessment was valid, and could not be questioned in any collateral proceeding. *Michener v. Payson*, 13 N. B. R. 49; 1 N. Y. Wkly. Dig. 272; 2 Wkly. Notes Cas. 339; 8 Chi. Leg. News, 17; 23 Pittsb. Leg. J. 88; Fed. Cas. 9,524.

### III. COMPOSITION.

See COMPOSITION, 26, 130.

263. The fact that a discharge has been refused is not a bar to composition; and the fact that a petition to review an order refusing a discharge is pending does not deprive the court of jurisdiction to entertain proceedings for composition. *In re Odell et al.*, 16 N. B. R. 501; 9 Ben. 247; Fed. Cas. 10,427.

264. The court may provide for an unliquidated claim in composition cases, as if the case were in bankruptcy, by permitting the prosecution of a pending action in the state court, or by ordering an inquiry in the bankruptcy court. *In re Trafton*, 14 N. B. R. 507; 2 Lowell, 505; Fed. Cas. 14,133.

265. If the district court has jurisdiction over the case in bankruptcy, and the notice of the meeting to consider a proposition of compromise was properly given, the omission to make a sufficient notice to the creditors of the hearing to determine whether the resolution has been properly passed does not render the order ratifying the resolution void in a collateral action. *Smith et al. v. Engle et al.*, 14 N. B. R. 481.

### IV. CRIMES AND OFFENSES.

266. The United States district court has no power to discharge a bankrupt held under arrest upon process issued by a state court in an action of tort in the nature of deceit, in obtaining possession of plaintiff's goods by means of false representations. *In re Devoe*, 2 N. B. R. 11; 1 Lowell, 251; 7 Amer. Law Reg. (N. S.) 690; 1 Amer. Law T. Rep. Bankr. 90; Fed. Cas. 3,843.

267. When a court of bankruptcy has no power to discharge a judgment, it cannot interfere to prevent its enforcement by imprisonment, unless necessary to the exercise of its jurisdiction. *In re Pettis*, 2 N. B. R. 17; 7 Amer. Law Reg. (N. S.) 695; Fed. Cas. 11,046.

268. A debtor was arrested at the suit of his creditor in a civil action pending in a state court, and was afterwards adjudicated a bankrupt. *Held*, that he could not be discharged by the bankruptcy court. *In re Hazleton*, 2 N. B. R. 12; 1 Lowell, 270; 1 Amer. Law T. Rep. Bankr. 105; Fed. Cas. 6,287.

269. An assignee in bankruptcy cannot maintain an action in the state courts to recover property transferred by a bankrupt in fraud of the bankrupt law. The provisions of the bankrupt law voiding such transfers are penal, and the courts of sovereignty will not take cognizance of nor enforce the penal code of another. *Bingham v. Claffin et al.*, 7 N. B. R. 412.

### V. RULES, FORMS AND ORDERS.

270. Where a district court has granted a discharge it has sole jurisdiction of a proceeding to annul it. *Nicholas, Ass., v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

271. The bankruptcy courts are not hampered by such technical rules as will prevent the doing of what is just and for the protection of the estate, even if it required the revocation of an order once made. *Samson v. Burton*, 6 N. B. R. 403.

272. In the entry on the docket of a judgment, the amount and date of the judgment, the parties to it, and the court in which it was rendered, appeared. *Held*, a valid entry. *In re Boyd*, 16 N. B. R. 204; 4 Sawy. 262; 9 Chi. Leg. News, 385; 10 Chi. Leg. News, 1; 4 Law & Eq. Rep. 488; 6 Amer. Law Rec. 311; Fed. Cas. 1,746.

273. The district courts have no power to make general rules in bankruptcy. In re Kennedy et al., 7 N. B. R. 337; Fed. Cas. 7,699.

## VI. COMPUTATION OF TIME.

274. A debtor who has carried on business within a district for two months during the six months next preceding the filing of a petition, carried on business "for the longest period during such six months" there, and the district court for that district has jurisdiction to entertain a petition filed against him. In re Foster et al., 3 N. B. R. 57; 8 Ben. 336; Fed. Cas. 4,962.

## VII. TRANSFER OF CAUSES.

275. In suits instituted in, or transferred to, the federal courts, the same defenses, set-offs and counter-claims may be interposed as could be if they were tried in the state tribunals. In re Osage V. & S. K. R. R. Co., 9 N. B. R. 281; 1 Cent. Law J. 33; Fed. Cas. 10,592.

## VIII. CLAIMS.

See CLAIMS, 4, 33; SECURED CLAIMS, 69.

### (a) *Filing and Withdrawal.*

276. The bankrupt court has full equitable discretion to allow a case to be withdrawn, provided it can be done without prejudice to the interests of any of the parties who are before it. In re Indianapolis, C. & L. R. R. Co., 8 N. B. R. 303; 5 Biss. 287; 21 Pittsb. Leg. J. 4; Fed. Cas. 7,023.

277. When a creditor presents his claim for probate he at once subjects himself and his claim to jurisdiction of the court within provisions of bankrupt act, among which is that court may examine such creditor. He is therefore examined as a party and not as a witness. In re Paddock, 6 N. B. R. 396; Fed. Cas. 10,658.

278. The power of the court to authorize a creditor to withdraw a proof that has been filed inadvertently is wholly discretionary, and will not be exercised for the purpose of allowing a creditor to continue an arrest of the bankrupt which was made before the commencement of the proceedings. In re Wiener, 14 N. B. R. 218; 3 N. Y. Wkly. Dig. 95; Fed. Cas. 17,620.

### (b) *Preference.*

279. The judgment of a district court that the claims of a creditor are affected by preferential securities, and that he shall be debarred from participating in a fund then under course of distribution, is conclusive upon such creditor. The judgment of a court of competent jurisdiction upon a point litigated between the parties is conclusive in all subsequent controversies, when the same matter comes again in question between the same parties. In re Leland et al., 16 N. B. R. 505; 14 Blatchf. 240; Fed. Cas. 8,235.

280. A. was indorser for B. on three notes. Within four months before B.'s bankruptcy he transferred to A. some land and a note, out of which A. was to indemnify himself. A. used the note to take up one of the notes of equal amount, and surrendered the lands transferred. Held, that A. was entitled to prove for the two notes not secured. In re Holland, 8 N. B. R. 190; Fed. Cas. 6,604.

## CRIMES AND OFFENSES.

### I. OMISSIONS FROM SCHEDULE.

#### (a) *Of Property.*

#### (b) *Of Creditors.*

### II. FALSE PRETENSES.

### III. UNLAWFUL CONVEYANCES.

### IV. EVIDENCE.

### V. GENERAL.

See CLAIMS, 191; COURTS, IV; ESTATES, 183; FRAUD.

### I. OMISSIONS FROM SCHEDULE.

See DISCHARGE, X, (e), XI, (c).

#### (a) *Of Property.*

1. The crime of fraudulently omitting property or effects from a bankrupt schedule is complete when the false schedule is filed. United States v. Clark, 4 N. B. R. 14; 1 Lowell, 402; 1 Amer. Law T. Rep. Bankr. 237; 8 Amer. Law T. 226; Fed. Cas. 14,806.

2. The offense of wilfully and fraudulently omitting, by a bankrupt, from the inventory of a portion of his assets, is not an infamous crime, as the term is used at common law and in the fifth amendment to the constitution. United States v. Block, 15 N. B. R. 325;

4 Sawy. 211; 9 Chi. Leg. News, 234; Fed. Cas. 14,609.

3. A bankrupt failed to schedule a judgment among his assets because "it had never occurred to him to place it there," and because he considered it worthless. *Held*, not to constitute false swearing. In re Winsor, 16 N. B. R. 152; 9 Chi. Leg. News, 402; 2 Cin. Law Bul. 212; Fed. Cas. 17,885.

### (b) Of Creditors.

4. A bankrupt omitted from his schedules the names of three of his creditors, with their knowledge and assent, from whom he had borrowed the money which formed the basis of his capital, to be repaid or not, as might be convenient. *Held*, that he was not guilty of having wilfully sworn falsely in his oath annexed to the schedules. In re Needham, 2 N. B. R. 124; 1 Lowell, 309; 2 Amer. Law T. Rep. Bankr. 39; 16 Pittsb. Leg. J. 313; 1 Chi. Leg. News, 171; Fed. Cas. 10,081.

## II. FALSE PRETENSES.

5. A. was arrested for fraudulently procuring goods in violation of the forty-fourth section of the act of 1867. Upon hearing before a United States commissioner, *held* that, there being probable cause for believing that defendant had committed the crime charged, he should be held to await action of the grand jury. *United States v. Thomas*, 7 N. B. R. 183.

6. To sustain an indictment under section 44 of the act of 1867, it must appear that the goods or chattels were obtained within three months before commencement of proceedings in bankruptcy, on credit, under the false pretense of carrying on business and dealing in the ordinary course of trade, and with intent to defraud. *United States v. Frank*, 3 N. B. R. 175; 2 Biss. 263; 17 Pittsb. Leg. J. 140; 2 Chi. Leg. News, 236; Fed. Cas. 15,159.

7. Where an insolvent obtained goods on credit from various parties with the intent to defraud, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, on a hearing before a commissioner he was held to bail. *United States v. Geary*, 4 N. B. R. 175.

8. An indictment charged the defendant

with obtaining goods under false pretense of carrying on business as a merchant and dealer in the ordinary course of trade. *Held*, that it must be shown that the defendant represented to the person from whom the goods were obtained that he was so carrying on business; that in consequence of this pretense parties were induced to part with their goods, and that in fact he was not so carrying on business. The pretenses may be established by facts and circumstances. *United States v. Penn*, 13 N. B. R. 464; Fed. Cas. 16,025.

9. An indictment against a trader for obtaining goods under false pretenses did not charge that the goods were obtained with intent to defraud creditors generally, nor was there an averment that the accused was not, in fact, carrying on business and dealing in the ordinary course of trade when he obtained the goods. *Held*, not defective. *United States v. Myers*, 16 N. B. R. 387; Fed. Cas. 15,848.

10. An indictment for obtaining goods under false pretenses will lie before an adjudication in bankruptcy. *Id.*

11. An alleged bankrupt was indicted under the ninth subdivision of section 5132 for obtaining goods under false pretenses within three months prior to filing his petition in bankruptcy. There was nothing to connect the offense with the bankruptcy proceedings. *Held*, it was not an offense against the United States. *United States v. Fox*, 17 N. B. R. 34; 95 U. S. 670.

## III. UNLAWFUL CONVEYANCES.

12. Under an indictment of a bankrupt for unlawfully disposing of goods with intent to defraud creditors, it must appear that the intent existed in the bankrupt's mind against his creditors generally, and not merely against the creditor from whom the goods were obtained. *United States v. Pennsylvania*, 13 N. B. R. 464; Fed. Cas. 16,025.

13. The bankrupt and certain other persons were indicted for a conspiracy to make, unlawfully, certain conveyances with intent to defraud the bankrupt's creditors. The defendants who were not bankrupt moved to quash the indictment on the ground that no person except one respecting whom pro-

ceedings in bankruptcy are commenced can commit the offense. *Held*, that such persons could conspire with the bankrupt. *United States v. Bayer et al.*, 18 N. B. R. 400; 4 Dill. 407; 8 Cent. Law J. 11; Fed. Cas. 14,547.

14. On indictment for purchasing goods on credit, and while they are unpaid for, and within three months before bankruptcy, giving chattel mortgage thereon, with intent to defraud creditors, *held*, that criminal intent could not be presumed, but must be proved. *United States v. Bayer*, 18 N. B. R. 88; Fed. Cas. 14,548.

#### IV. EVIDENCE.

15. Where the witness has since died, his examination before an examining court is competent evidence in a trial of the same party for the same offense. *United States v. Penn*, 18 N. B. R. 464; Fed. Cas. 16,025.

16. When a party is charged with absconding, statements made on his way from his place of residence, concerning his intention to return, may be admitted to disprove the charge. *Id.*

#### V. GENERAL.

17. An act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. *United States v. Fox*, 17 N. B. R. 84; 95 U. S. 670.

18. A bankrupt indebted to a bank and having funds there consummated forgery. The bank hearing of it compelled an immediate transfer of the funds to it. The bank also attached moneys belonging to A. in other banks. The bank knew of the insolvency of A. *Held* to be preferences. *West Philadelphia Bank v. Dickson et al., Ass.*, 17 N. B. R. 482; 95 U. S. 180.

19. Under section 44 of the act of 1867, offenses are misdemeanors, and the word "feloniously" should not be used. *United States v. Prescott et al.*, 4 N. B. R. 29; 2 Abb. (U. S.) 169; 2 Biss. 325; Fed. Cas. 16,084.

#### CROPS.

See GROWING CROPS.

#### CURTESY.

A wife executed a mortgage on her realty to secure a loan. The money obtained was used by her husband to pay his own debts, and the amount so used exceeded the amount to which he would be entitled by the curtesy. Afterward, husband and wife united in a general assignment of all the husband's property, but expressly reserving that of the wife. The wife died, and her realty was sold, and a sum realized greater than the incumbrances. The assignees claimed the residue as the husband's curtesy. *Held*, that the heirs or representatives of the wife were entitled to the fund. *Shippen and Robbins*, 15 N. B. R. 553.

#### DATE.

See TIME.

#### DEATH.

I. WHEN ABATES SUIT.

II. WHEN DOES NOT ABATE SUIT.

III. IN GENERAL.

See DISCHARGE, 193, XI, (e); TRUSTEE, 4.

#### I. WHEN ABATES SUIT.

1. Debtor against whom a petition had been filed demanded a jury trial, but died before the same could be had. *Held*, that the proceedings should abate. *Frazier & Fry v. McDonald*, 8 N. B. R. 287; 20 Pittsb. Leg. J. 185; Fed. Cas. 5,073.

#### II. WHEN DOES NOT ABATE SUIT.

2. If the debtor dies after the issue of the warrant in bankruptcy, the proceedings can be continued and concluded, except as to discharge, in like manner as if he had lived. *In re O'Farrell et al.*, 2 N. B. R. 154; 3 Ben. 191; 2 Amer. Law T. 106; 1 Amer. Law T. Rep. Bankr. 159; Fed. Cas. 10,446.

3. A proceeding in bankruptcy will not be discontinued by the death of the bankrupt between the time of entry of the order of adjudication and the physical "issuing of the warrant." *In re Litchfield*, 9 N. B. R. 506; 7 Ben. 259; Fed. Cas. 8,885.

## III. IN GENERAL.

4. Death of the bankrupt dispenses with the necessity of the final oath, and the discharge may be entered as of a time when the bankrupt was in life. *Young et al. v. Ridenbaugh's Adm'r*, 11 N. B. R. 563; 8 Dill 239; 7 Chi. Leg. News, 242; Fed. Cas. 18,178.

5. Where the debtor appears and confesses the acts of bankruptcy charged in a creditor's petition, and a trustee is appointed under section 43 of the act of 1867, a creditor who has proved his debt cannot appear and set aside the adjudication after the death of the bankrupt and the rights of third parties have intervened. *In re Thomas*, 11 N. B. R. 880; 7 Chi. Leg. News, 187; Fed. Cas. 18,891.

6. In proceedings against the estate of a deceased bankrupt, a creditor is competent to prove the contract on which his claim is based. *In re Merrill*, 16 N. B. R. 85; 9 Ben. 165; 24 Pittsb. Leg. J. 205; Fed. Cas. 9,466.

## DEBT.

## See CLAIMS.

1. The word "debt," as used in the bankrupt law, is synonymous with claim. *Stokes & Leonard v. Mason*, 12 N. B. R. 498.

2. A debt is properly within the meaning of the limitation clause of the law concerning suits about any property claimed by the assignee. *Jenkins v. Bank*, 106 U. S. 571.

## DECREES.

## See PLEADING AND PRACTICE, X.

## DEEDS.

See ESTATES, 286; ESTOPPEL, 19; TRUSTEE, 187.

1. The date of the execution and delivery of deeds and not date named therein is the time from which to reckon the six months within which a petition in bankruptcy is to be filed where the deed is intended to defraud creditors. *In re Rooney*, 6 N. B. R. 163; Fed. Cas. 12,082.

2. A deed dated March 2, 1871, was recorded June 11, 1871, and petition filed No-

vember 9, 1871. *Held*, that the deed took effect less than six months before the commencement of proceedings in bankruptcy. *Thornhill & Co. v. Link*, 8 N. B. R. 521; Fed. Cas. 18,998.

3. Deed of trust was executed and delivered several years prior to filing petition in bankruptcy, but was acknowledged and recorded only two months prior to that date. Under the laws of the state acknowledgment and record were not essential to the validity of the deed. *Held*, that it could not be avoided by the assignee in bankruptcy. *Seaver v. Spink*, 8 N. B. R. 218.

4. Sale under deed of trust executed prior to bankruptcy, made after proceedings commenced, is voidable, not void. *McGready v. Harris*, 9 N. B. R. 185.

5. A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent. *Barker v. Smith et al.*, 12 N. B. R. 474; 2 Woods, 87; 2 Amer. Law T. Rep. (N. S.) 386; Fed. Cas. 986.

6. A person who is interested in a deed may take and certify as notary the grantor's acknowledgment of it when the act is purely ministerial. *Nat. Bank of Fredericksburg v. Conway*, 14 N. B. R. 175; 1 Hughes, 37; Fed. Cas. 10,037.

7. A deed as an unlawful preference can be avoided only in the case of voluntary and not involuntary bankruptcy. It is not a case of voluntary bankruptcy where one is forced into it against his will by his partner, and becomes involuntary if he refuses to join in such a case. *Metaker v. Bonebrake*, 108 U. S. 66.

## DEFERRED PAYMENTS.

See COMPOSITION, VII, 66, 83, 132, 134-136.

## DEFINITIONS.

1. *Assets*.—The word "assets" as used in section 33 means money received by the assignee and not the appraised value of the estate which may come into his hands (act of 1867). *In re Van Ripper*, 6 N. B. R. 578; Fed. Cas. 16,874. See ESTATES, 184.

**2. Bankruptcy.**—Under the act of 1841, the word "bankruptcy" meant a particular legal status, to be ascertained and declared by judicial decree. In *re Black et al.*, 1 N. B. R. 81; 2 Ben. 196; 1 Amer. Law T. Rep. Bankr. 39; Fed. Cas. 1,457.

**2a. Business corporation.**—See CORPORATIONS, 3.

**3. Carrying on business.**—B. acted as agent and attorney for his brother in buying and selling merchandise in New York City, at an office having a sign with his brother's name on it, and was well known by those who had dealings with him to be doing such business at said office. He was held to be carrying on business within the meaning of section 11 of the act. In *re Baily*, 1 N. B. R. 177; 2 Ben. 437; Fed. Cas. 753.

**4. "Carrying on business,"** referred to in section 11 (act of 1867) in reference to a railroad company, means where the road is or is to be constructed, maintained and operated. In *re Alabama & Chattanooga R. R. Co.*, 6 N. B. R. 107; 9 Blatchf. 390; 6 Amer. Law Rev. 577; Fed. Cas. 124.

**5. Commerce.**—The word "commerce" includes navigation as well as traffic, and the power to regulate extends to vehicles of intercourse as well as to the commodities to be exchanged. *Sweatt v. Boston, H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 839; 1 Amer. Law T. Rep. Bankr. 273; 4 Amer. Law T. 173; 6 Amer. Law Rev. 168; Fed. Cas. 13,634.

**6. Commercial paper.**—This term covers bills of exchange, promissory notes, bank checks and other negotiable instruments for the payment of money, which, by their form and on their face, purport to be such instruments as are by the law merchant recognized as falling under the designation of "commercial paper." In *re Hercules Mutual Life Assurance Society*, 6 N. B. R. 338; 6 Ben. 35; 6 Alb. Law J. 358; Fed. Cas. 6,402. See COMMERCIAL PAPER, 2.

**6a. Composition.**—See COMPOSITION, 150.

**6b. Corporations.**—See CORPORATIONS, 1; PERSON, 20.

**7. Creditor.**—The word "creditors," in the section of the bankrupt act relating to composition, means all whose debts are provable in bankruptcy. *Ex parte Trafton*, 14 N. B. R. 507; 2 Lowell, 505; Fed. Cas. 14,123.

**8. Debt.**—A debt which is not due, as well as one due, falls within the meaning of a by-law prohibiting the transfer of stock by one who is indebted to the corporation. A liability for an unpaid balance upon the capital stock is a debt within the meaning of such by-law. In *re Bachman*, 12 N. B. R. 223; 2 Cent. Law J. 119; 22 Int. Rev. Rec. 19; Fed. Cas. 707.

**9.** The word "debt" as used in the bankrupt law is synonymous with "claim." *Stokes & Leonard v. Mason*, 12 N. B. R. 498.

**9a. Fraud.**—See FRAUD, 64.

**10. Insolvency.**—Traders and merchants are insolvent when they are unable to pay their debts as they become due in the ordinary course of business. *Ecfort & Petring v. Greely*, 6 N. B. R. 433; 4 Chi. Leg. News, 209; Fed. Cas. 4,260.

**11. Insolvency,** when applied to traders and merchants, means inability to pay their debts, in money, in the ordinary course of business as they fall due. *Toof v. Martin*, 6 N. B. R. 49; 13 Wall. 40. See INSOLVENCY, 7, 12, 22, 24-26.

**12. Insolvent.**—A merchant is insolvent when he is unable to pay his debts in the ordinary course of business, even though if given time to realize on his assets he may be able to pay them in full. In *re Hauck & Co.*, 17 N. B. R. 158; Fed. Cas. 6,219.

**13. Knowledge.**—In section 85 of the act of 1867 as amended, the word "knowledge" means actual and not constructive knowledge; but actual knowledge may be presumed from the circumstances of the case. In *re Hauck & Co.*, 17 N. B. R. 158; Fed. Cas. 6,219.

**14. Manufacturer.**—One who prepares for market and sells lumber, the growth of his own land, is a manufacturer within the meaning of the bankrupt act as amended by the act of July 14, 1870. In *re Chandler*, 4 N. B. R. 66; 1 Lowell, 478; Fed. Cas. 2,591.

**15.** The publisher of a newspaper demurred to a petition on the ground that it was not a manufacture within the meaning of the bankrupt act. *Held*, that the publisher was not a manufacturer. In *re Capital Publishing Co.*, 18 N. B. R. 319.

**16.** The publishers of a daily paper and proprietors of a book and job printing office

are manufacturers within the meaning of the bankrupt act. In *re* Kenyon & Fenton, 6 N. B. R. 238. See PUBLISHER, § 21, *post*.

**17. Merchant or tradesman.**—Under the seventh subdivision of section 5110, a saloon-keeper who buys liquors and cigars in quantities, and some on credit, and sells them at retail for cash and on credit, is a merchant or tradesman. In *re* Sherwood, 17 N. B. R. 112; 9 Ben. 66; Fed. Cas. 12,773.

**18. Bankrupt** was a stock and gold broker, but was not a member of Stock Exchange, and conducted his business through other brokers who were members. On objection to his discharge on the ground that, being a "merchant or tradesman," he kept no books of account, *held*, that he was not a "merchant or tradesman" within the meaning of the act. In *re* Moss, 19 N. B. R. 132; Fed. Cas. 9,877.

**19. Party.**—Only a party to the proceedings before the register can take the opinion of the district judge on a certificate of the register on a matter arising in the course of such proceedings, or upon the result of them. The word "party" means the bankrupt or a creditor of his. In *re* Fredenburg, 1 N. B. R. 34; 2 Ben. 183; Fed. Cas. 5,075.

**20. Person.**—In the absence of any statute definition to that effect, the word "person" should be construed to include a corporation, unless it appears that it was used in a more limited sense. In *re* Oregon Publishing & Printing Co., 13 N. B. R. 199; 10 Amer. Law Rev. 880; 8 Chi. Leg. News, 81; Fed. Cas. 10,558.

**21. Publisher.**—The publisher of a newspaper is not a manufacturer. In *re* The Capital Publishing Co., 18 N. B. R. 319.

**21a. Residence.**—See PETITION, 97.

**22. Secured creditor.**—A creditor seizing property by attachment issued from a state court within four months prior to the beginning of bankruptcy proceedings is not a secured creditor within the meaning of section 5075, Revised Statutes. In *re* Broich et al., 15 N. B. R. 11; 7 Biss. 803; Fed. Cas. 1,921.

**23. Tradesman.**—A merchant miller who purchases grain, grinds it into flour and feed, and retails the manufactured articles from a store, is a tradesman within the mean-

ing of Revised Statutes, section 5110. In *re* Anketell, 19 N. B. R. 268; Fed. Cas. 394.

**24.** A debtor who carried on business on a cash basis, and a considerable time prior to filing his petition had given up the business, leaving nothing outstanding either as assets or debts, is not a tradesman within the meaning of the law. In *re* Keach, 3 N. B. R. 3; 1 Lowell, 335; 2 Amer. Law T. 123; 1 Amer. Law T. Rep. Bankr. 167; Fed. Cas. 7,629.

**25.** The meaning of the word "tradesman" in section 5110, Revised Statutes, is substantially the same as "shop-keeper." Persons who buy and sell in a small way merely to eke out their living, principally earned in other ways, are not tradesmen. As the word occurs in a section almost penal in character, it should be confined to those who belong to that class with some degree of permanence. In *re* Cote, 14 N. B. R. 503; 2 Lowell, 374; Fed. Cas. 3,267.

**26.** A farmer and dealer in live-stock is not a "tradesman" within the meaning of the bankrupt act. In *re* Rugsdale, 16 N. B. R. 215; 25 Pittsb. Leg. J. 64; Fed. Cas. 12,123.

**27.** The word "tradesman," as used in the bankrupt act, refers to smaller merchants or tradesmen, or a shop-keeper. In *re* Stickney, 17 N. B. R. 305; 5 Rep. 586; 5 Cent. Law J. 265; Fed. Cas. 13,439.

**28.** Where a firm own and operate a farm, and the members own stock in, and are officers of, a manufacturing corporation which is solvent, they are not "tradesmen" within the meaning of the bankrupt act. *Id*.

**29.** A person whose occupation is a stair-builder, consisting in buying lumber and other materials and fashioning it into stairs, is a merchant or tradesman within the meaning of the bankrupt act. In *re* Garrison, 7 N. B. R. 287; 5 Ben. 430; Fed. Cas. 5,254.

**30.** A person who owns oil lands, which he divides into leaseholds and receives rent in oil, however extensive his transactions and credits, is not a trader within the meaning of the thirty-ninth section of the act of 1867. In *re* Woods, 7 N. B. R. 126; 29 Leg. Int. 236; 20 Pittsb. Leg. J. 21; Fed. Cas. 17,990.

**31.** One engaged in the manufacture and sale of lumber is a trader within the meaning of the act of 1867. In *re* Cowles, 1 N. B. R. 42; Fed. Cas. 3,207.

**DEMURRER.**

See PLEADING AND PRACTICE, XV, (c).

**DEPOSITIONS.**

See EVIDENCE.

**DEPOSITORY.**

See BANKS, 81-83.

**DISCHARGE.**

- I. IN GENERAL.
- II. SPECIFICATION IN OPPOSITION.
- III. WHO MAY OPPOSE.
- IV. WHO MAY NOT OPPOSE.
- V. WHEN IT MAY BE OPPOSED.
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- VII. APPLICATION FOR DISCHARGE.
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- XI. REFUSAL OF DISCHARGE.
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- XII. STAY OF PROCEEDINGS PENDING.
- XIII. APPLICATION TO ANNUL.
  - (a) *In General.*
  - (b) *When Must be Made.*
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**XIV. DEBTS NOT RELEASED BY.**

- (a) *In General.*
- (b) *Fiduciary.*
- (c) *Fraudulent.*
- (d) *Judgment Not Proved.*
- (e) *Surety's.*

**XV. DEBTS RELEASED BY.**

- (a) *In General.*
- (b) *Provable.*
- (c) *Not Fiduciary.*
- (d) *Despite Omission from Schedule.*
- (e) *Surety on Bond.*
- (f) *Of Partnership.*

**XVI. EFFECT OF.****XVII. COLLATERAL ATTACK ON.****XVIII. PLEADING A DISCHARGE.**

- (a) *In General.*
- (b) *Failure to Plead.*
- (c) *When Not Pleadable.*

**XIX. REVIVAL OF DEBT AFTER.**

See BOOKS OF ACCOUNT; COMPOSITION, 126, 144, 146, 151-158; CONFLICT OF LAWS, 6; CONSTITUTIONAL LAW, 18; ESTATES, 116, 172, 173, 204; ESTOPPEL, 19; EVIDENCE, 89; EXAMINATION OF BANKRUPT, 28, 84, 86, 88, 41, 48, 51; FRAUD, 100; JUDGMENT, 19; JURY TRIALS, 8; LIENS, 92; LIMITATIONS, STATUTE OF, 57; MORTGAGE, 57, 146; NOTICE, 58; PARTNERS, 54-55; PETITION, 144, 158; PLEADING AND PRACTICE, 18-55; PREFERENCES, 55, 238; PROOF OF CLAIMS, 40, 46, 79, 80; SALES, 127; SCHEDULE, 24, 28; TRUSTEE, 112.

**I. IN GENERAL.**

1. A final disposition of a cause in bankruptcy may take place although no application for a discharge has been made and no action of the court had upon the subject. *In re Brightman et al.*, 15 N. B. R. 213, 215; 14 Blatchf. 130; Fed. Cas. 1,878.

2. A discharge by virtue of compliance with the terms of composition is a discharge by operation of law. *In re Merriman's Estate*, 18 N. B. R. 411; 44 Conn. 587; 26 Pittsb. Leg. J. 120; Fed. Cas. 9,479.

3. Matter intended to avoid a discharge should be replied in response to the plea, and not be set forth in the declaration. *Brown et al. v. Broach et al.*, 16 N. B. R. 296.



4. The costs upon the petition for a discharge of involuntary bankrupts, the hearing, etc., must be paid out of the funds in the assignee's hands. In *re Olds*, 4 N. B. R. 37; Fed. Cas. 10,484.

5. The provisions of the ninth section of the act of 1874, in respect to discharges, both in cases of involuntary and of voluntary bankruptcy, apply only to cases to be commenced after the passage of that act. In *re Sheldon*, 13 N. B. R. 63; 8 Ben. 67; Fed. Cas. 12,747.

C. A bankrupt presented his petition for a full discharge. The register refused the same upon the ground of lack of power, and certified the same to the court. *Held*, that the register is vested with all the powers of the district court in relation to matters as to which there is no contest. In *re Gettleston*, 1 N. B. R. 170; Fed. Cas. 5,373.

7. The question was referred whether an order of reference and an order to show cause why the bankrupt should not be discharged ought to be discharged on the ground that six months from the date of the adjudication had not expired. No assets were received by the assignee. *Held*, that the order was regular and should not be discharged. In *re Solis*, 3 N. B. R. 186; 4 Ben. 143; 4 N. B. R. 18; Fed. Cas. 13,165.

8. Upon the examination of a bankrupt it was disclosed that a lease of considerable value was his property, whereupon he applied by petition for leave to amend his schedule by inserting the lease. *Held*, that the register has power to allow such amendment, but that creditors are not thereby precluded from opposing his discharge on the ground of such omission. In *re Watts*, 2 N. B. R. 145; 3 Ben. 166; 2 Amer. Law T. Rep. Bankr. 74; Fed. Cas. 17,293.

9. The state insolvency laws were not superseded by the United States bankrupt act until June 1, 1867, so that where the proceedings in the state courts were begun prior to that date, a discharge rendered thereafter is valid. *Martin v. Berry*, 2 N. B. R. 188.

10. A bankrupt was adjudicated upon the petition of creditors charging suspension of commercial paper. A petition to set aside the same was filed, alleging that he fraudulently procured the filing of the petition.

*Held*, that every movement by the bankrupt under such a state of facts is in contempt of court, and proceedings for discharge will be perpetually stayed unless he complies with the terms imposed by the court. In *re Lalor*, 19 N. B. R. 253; Fed. Cas. 8,001.

11. The solicitors of a voluntary bankrupt presented a petition, claiming that the assets were equal to fifty per cent. of the provable debts, and asked that appraisers be appointed to ascertain the value of the assets. No claims had been proved and no assignee appointed. Petition denied. In *re Freiderick*, 3 N. B. R. 117; 3 Amer. Law T. Rep. Bankr. 71; 2 Chi. Leg. News, 189; 1 Amer. Law T. Rep. Bankr. 181; Fed. Cas. 5,092.

12. A creditor having proved his debt in bankruptcy, and there having been unreasonable delay by the debtor in obtaining his discharge, the former attempted to execute a judgment obtained prior to bankruptcy, and on objection under section 21 of the act of 1867, *held*, such proof is not a satisfaction of the debt, but a discharge by the bankrupt court must first be obtained, and, if refused, the creditor can proceed at law. *Dingee v. Becker*, 9 N. B. R. 508; Fed. Cas. 3,919.

13. Where a member of an existing firm has filed an individual petition in bankruptcy, and there are firm debts and firm assets, the firm must be declared bankrupt before a member thereof can be discharged from its liabilities. This applies only to co-partnerships actually existing, or where there are assets belonging to the firm. In *re Winkens*, 2 N. B. R. 113; Fed. Cas. 17,875.

## II. SPECIFICATION IN OPPOSITION.

### See COSTS AND FEES, 34.

14. Specifications in opposition to a discharge must be precise and definite, and as exact as specifications in an indictment. In *re Butterfield*, 14 N. B. R. 147; 5 Biss. 120; Fed. Cas. 2,247; In *re Hill*, 1 N. B. R. 42; 2 Ben. 136; 15 Pittsb. Leg. J. 320; Fed. Cas. 6,482; In *re McIntire*, 1 N. B. R. 115; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 8,823; In *re Son*, 1 N. B. R. 58; 2 Ben. 153; 15 Pittsb. Leg. J. 242; Fed. Cas. 13,174; In *re Tyrrel*, 2 N. B. R. 73; Fed. Cas. 14,314; In *re Hansen*, 2

N. B. R. 75; Fed. Cas. 6,039; In re Dreyer, 2 N. B. R. 76; Fed. Cas. 4,082.

15. An allegation in a specification in opposition to discharge that the bankrupt had concealed property of considerable value is bad because it does not describe the property as to kind or quantity, and does not state how the concealment was effected or when it occurred. In re Rathbone, 1 N. B. R. 50; 2 Ben. 138; 15 Pittsb. Law J. 233; 25 Leg. Int. 60; Fed. Cas. 11,590.

16. The allegations of the specification in opposition to discharge must be of fact, and be distinct, precise and specific, and must not be allegations merely in the language of section 29 of the act of 1867, or so general as not to advise the bankrupt what facts he must be prepared to meet. *Id.*

17. If a discharge is to be refused because a debt was created through the fraudulent representations of the bankrupt, the nature, character, time, place and circumstances of the representations must be specified, and the particulars wherein they were false or fraudulent. In re Rathbone, 1 N. B. R. 65; 1 Amer. Law T. Rep. Bankr. 44; Fed. Cas. 11,582.

18. A specification in opposition to discharge, alleging the concealing of property, must specify what property, unless it means all the property. If it means all the property, the time, place, manner and circumstances of the concealing should be specified. In re Beardsley, 1 N. B. R. 52; Fed. Cas. 1,183.

19. Specifications against the discharge of a bankrupt charged him with having concealed his estate and effects, and with having concealed, removed, altered and destroyed the books and writings relating thereto. *Held*, that such specification was too vague and that the particulars should be set forth. In re Condict, 19 N. B. R. 142; 2 N. J. Law J. 82; Fed. Cas. 3,094.

20. Where a specification in opposition to the discharge of a bankrupt is that he has concealed his effects, or that he has sworn falsely in his affidavit annexed to his schedule, it must be shown that the acts were intentional in order to preclude a discharge. In re Wyatt, 2 N. B. R. 94; Fed. Cas. 18,106.

21. A specification stating that a debt had been created by fraud is not good, and will be stricken out on motion. In re Rosenfield, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618;

1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,058.

22. A specification in opposition to discharge is sufficient if it allege fraudulent preference, even though it does not allege the same was made in contemplation of becoming bankrupt or was made to creditors. In re Smith & Bickford, 5 N. B. R. 20; Fed. Cas. 12,958.

23. A bankrupt is entitled, in a specification in opposition to discharge, to such particularity of statement as will give him reasonable notice of what is expected to be proved against him. *Id.*

24. If false swearing be alleged in a specification, it must be charged to have been wilful. *Id.*

25. On motion, specifications against the bankrupt's discharge will be stricken out if no appearance be made upon the order to show cause. *Id.*

26. A specification in opposition to discharge, which states in general terms an act of omission on the part of a bankrupt, but does not state in what particular, or that it was intentional or fraudulent, is not sufficient to prevent the discharge. In re McVey, 2 N. B. R. 85; 1 Chi. Leg. News, 108; Fed. Cas. 8,932.

27. An allegation in a specification filed in opposition to discharge, that "said bankrupt has wilfully omitted" certain premises from the schedule attached to his petition, is insufficient, as it is not alleged that the bankrupt has wilfully sworn falsely in his affidavit annexed to his schedule as required by the act. In re Keefer, 4 N. B. R. 126; 3 Chi. Leg. News, 125; Fed. Cas. 7,636.

28. The specifications in opposition to discharge alleged that the bankrupt failed to schedule certain property, but fraud was not alleged; that the assignee made a mistake in exempting property; that the bankrupt negligently allowed property to be destroyed, but no time or specified amount was alleged, and the other specifications were vague, uncertain and at variance with each other. The specifications were dismissed and a discharge ordered. In re Eidom, 3 N. B. R. 27; Fed. Cas. 4,814.

29. Until an opposing creditor has filed a specification of the ground of his opposition to a discharge, the question cannot be cer-

tified to the court whether or not the bankrupt is entitled thereto. In re Mawson, 1 N. B. R. 33; 2 Ben. 122; Fed. Cas. 9,817.

30. Whenever the objection to a discharge rests on facts, there must be a specification, in order that the bankrupt may produce evidence and that there may be a trial of the fact. In re White et al., 18 N. B. R. 107; Fed. Cas. 17,533.

31. A creditor opposing the discharge of a bankrupt must enter his appearance and file specifications at the time required by law. In re McVey, 2 N. B. R. 85; 1 Chi. Leg. News, 103; Fed. Cas. 8,932.

32. The statute lays down no time certain within which specifications in opposition to discharge are to be filed, but leaves that matter to be regulated by the supreme court, and the rule of court gives a power to enlarge the time. In re Houghton, 10 N. B. R. 337; 2 Lowell, 328; Fed. Cas. 6,730.

33. When through inadvertence creditors who have filed notices of opposition to discharge fail to file specifications of objections within ten days after the return day of the order to show cause, they may be permitted to file the same *nunc pro tunc*. In re Grefe, 2 N. B. R. 106; Fed. Cas. 5,794.

34. The district court may, in its discretion, allow a creditor to enter his appearance and file specifications in opposition to a discharge, although the time for entering an appearance in opposition thereto has expired. In re Levin, 14 N. B. R. 385; 7 Biss. 231; Fed. Cas. 8,291.

35. The specification of grounds of opposition to a discharge was filed by the creditors with the register nine days after the final meeting. *Held*, that it was not filed in accordance with the provisions of the law. In re Buxbaum, 13 N. B. R. 477; 2 Hughes, 339; Fed. Cas. 2,259.

36. Specifications in opposition to a bankrupt's discharge must conform to section 33 of the act of 1867, and should not charge that the bankrupt, being insolvent, with intent to prefer an opposing creditor, made an assignment for his benefit. In re Jones & Hoyt, 12 N. B. R. 43; 7 Chi. Leg. News, 162; Fed. Cas. 7,452.

37. The oath required by section 20 of the act of 1867 must be repeated after specifications in opposition to discharge are filed but

subsequently withdrawn. In re Machad, 2 N. B. R. 113; 3 Ben. 131; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 8,819.

38. A specification filed in opposition to a bankrupt's discharge will not be stricken out because all the transactions therein alleged as the grounds of opposition occurred before the passage of the bankrupt act of 1867, since there is nothing in the language of section 29, in the clauses not specifying time, which indicates an intention to confine the operation of its provisions to transactions occurring after the passage of the act. In re Cretiew, 5 N. B. R. 423-29; Fed. Cas. 3,890.

### III. WHO MAY OPPOSE.

39. Any creditor with a provable debt may oppose the discharge of bankrupt. In re Murdock, 3 N. B. R. 36; 1 Lowell, 362; Fed. Cas. 9,939.

40. Any creditor of a bankrupt may oppose the discharge whether he has proved his debt or not. In re Sheppard, 1 N. B. R. 115; 7 Amer. Law Reg. (N. S.) 484; 1 Amer. Law T. Rep. Bankr. 49; Fed. Cas. 12,753.

41. Any person who has a pecuniary interest, including creditors who have not proved their debts, can oppose the discharge of a bankrupt when such pecuniary interest is satisfactorily shown to the court. In re Boutelle, 2 N. B. R. 51; 15 Pittsb. Leg. J. 616; 1 Chi. Leg. News, 30; Fed. Cas. 1,705.

42. Specifications in opposition to discharge were filed by a creditor who had obtained judgment pending proceedings in bankruptcy. On motion to dismiss the specifications, *held*, that the judgment creditor had an interest which entitled him to be heard. In re Stansfield, 16 N. B. R. 268; 4 Sawy. 334; Fed. Cas. 13,294.

43. The only class of creditors who can oppose the discharge of a bankrupt, or withhold assent from such discharge, on the ground that fifty per centum has not been realized under the act of 1867, are those whose debts were contracted since January 1, 1869. In re Pierson, 10 N. B. R. 193; Fed. Cas. 11,154.

44. Under the bankrupt act of 1841, and under the insolvent law of Massachusetts, *held*, that from the nature of the case it is

within the power of the court to authorize a new creditor to come in and oppose a discharge. In re Houghton, 10 N. B. R. 837; 2 Lowell, 828; Fed. Cas. 6,780.

#### IV. WHO MAY NOT OPPOSE.

See CLAIMS, 247.

45. Creditors who have not duly proved their claims cannot appear to oppose the discharge of the bankrupt. In re Levy, 1 N. B. R. 66; 2 Ben. 189; 1 Amer. Law T. Rep. Bankr. 132; Fed. Cas. 8,297.

46. A creditor who has not proved his claim will not be heard in opposition to a bankrupt's discharge. In re Burk, 8 N. B. R. 76; Deady, 425; 2 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 2,156.

47. The time for hearing an application to discharge a bankrupt expired before a certain creditor proved his debt. *Held*, that he could not be heard in opposition. In re Borst, 11 N. B. R. 96; Fed. Cas. 1,666.

48. A power of attorney, in accordance with form No. 26, under the act of 1867, in which the concluding words are, "and with like power to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be holden therein, for any of the purposes aforesaid, or for the declaration of dividend, or for any other purpose in my interest whatever," does not authorize the filing of an opposition to the bankrupt's discharge by the attorney to whom the power of attorney is given. *Creditors v. Williams*, 4 N. B. R. 187; Fed. Cas. 3,879.

49. A creditor whose debt was contracted before January 1, 1869, should not be allowed to vote on the question of a bankrupt's discharge as to debts contracted since that date, within the meaning of the thirty-third section of the act of 1867, as amended July 17, 1870. In re Parrish, 9 N. B. R. 573; Fed. Cas. 10,769.

50. At the time fixed for hearing, two creditors who had signed their assent to the discharge appeared and objected to the same, and filed petitions to withdraw such assent or have it held for naught. It not being shown that such assent had been obtained by fraud, *held*, that their petition should be

denied. In re Brent, 8 N. B. R. 444; 2 Dill 129; 18 Int. Rev. Rec. 159; Fed. Cas. 1,832.

51. Creditors who are beneficiaries under a general assignment by a debtor of all of his property for the benefit of all of his creditors without preference, and who have assented in writing to a substitution of assignees thereunder, are estopped from opposing the discharge of the debtor in bankruptcy on the ground that such assignment was a fraud on the bankrupt act. In re Schuyler, 2 N. B. R. 169; 3 Ben. 200; 16 Pittsb. Leg. J. 94; 2 Amer. Law T. Rep. Bankr. 85; Fed. Cas. 12,494.

52. A creditor of a bankrupt had proved his debt and had afterwards obtained judgment and taken out execution in a suit which was pending at the time of the bankruptcy. Such creditor opposed the discharge, *Held*, the discharge cannot properly be opposed by him. In re Gallison et al., 5 N. B. R. 353; 2 Lowell, 72; Fed. Cas. 5,203.

#### V. WHEN IT MAY BE OPPOSED.

53. Time may be given to other creditors to appear and oppose a discharge, when specifications have been overruled on grounds which apply to the opposing creditor individually. In re Antisdel, 18 N. B. R. 289; Fed. Cas. 490.

54. Where the proceedings upon an order to show cause in opposition to discharge were adjourned, any creditor entitled to show cause may do so on the day to which the proceedings were adjourned, and within ten days thereafter may file his specifications. In re Tallman, 1 N. B. R. 145; 2 Ben. 404; Fed. Cas. 13,470.

55. An appearance from a creditor in opposition to a discharge is not too late if entered on an adjourned day on an order to show cause on a return day. In re Seabury, 10 N. B. R. 90; Fed. Cas. 12,573.

56. A creditor who has proved his debt may file specifications in opposition to discharge at any time before the period fixed by general order No. 24, under the act of 1867. In re Baum, 1 N. B. R. 5 (8 vo. ed.).

57. A creditor filed his objections to a discharge, and, after the time had passed for creditors to appear, another asked leave to be heard in support of these objections, if

the original objector declined to prosecute. *Held*, a creditor has no absolute right to appear and oppose after the return day of the order to show cause, though the proceedings may have been adjourned for other purposes. It is, however, within the power of the court to permit opposition to be made at any time before the discharge is granted. *In re Houghton*, 10 N. B. R. 337; 2 Lowell, 328; Fed. Cas. 6,730.

## VI. WHEN IT MAY NOT BE OPPOSED.

58. At the first meeting of creditors a creditor filed objection to the bankrupt's discharge. *Held*, that the register had no authority to decide such questions, which are determined by the district court upon the application of the bankrupt for his discharge. *In re Puffer*, 2 N. B. R. 17; 15 Pittsb. Leg. J. 534; Fed. Cas. 11,459.

59. Creditors will not be allowed to intervene, after the return day, to prosecute specifications in opposition to discharge filed by a creditor whose claim was stricken out after the filing thereof. *In re McDonald*, 14 N. B. R. 477; 24 Pittsb. Leg. J. 42; Fed. Cas. 8,753.

## VII. APPLICATION FOR DISCHARGE.

### (a) *When to be Made.*

60. A bankrupt may, under the act of 1867, apply for a discharge within sixty days after his adjudication in bankruptcy where debts have been proved but no assets have come to the hands of the assignee. *In re Woolums*, 1 N. B. R. 181; Fed. Cas. 18,084.

61. The bankrupt may state that no debts have been proved when he applies for a discharge after sixty days and within six months after adjudication, or that no assets have come to the assignee, to obtain an order to show cause. A discharge will be granted upon satisfactory evidence of no debts proved, and no assets in the hands of the assignee, the evidence thereof being the return of the assignee. *In re Bellamy*, 1 N. B. R. 64 (8 vo. ed.).

62. An application for discharge must be made within one year after the date of adjudication in bankruptcy. *In re Willmott*, 2 N. B. R. 76; 1 Amer. Law T. Rep. Bankr. 121; Fed. Cas. 17,778; *In re Greenfield*, 2 N. B. R. 98; 1 Chi. Leg. News, 128; Fed. Cas. 5,774.

63. Only in cases in which bankrupts can apply for their discharge within less than six months from adjudication are they required to apply therefor within a year from such date. *In re Greenfield*, 2 N. B. R. 100; 1 Chi. Leg. News, 139; Fed. Cas. 5,775.

64. A discharge cannot be granted to an applicant who might have applied therefor within less than six months from the adjudication in bankruptcy unless the application be made within one year from such date. *In re Martin*, 2 N. B. R. 169; Fed. Cas. 9,153.

65. The limitation of one year in section 29 of the act of 1867, within which the court had power to grant a discharge, applied only to those cases where no debts had been proved, or no assets had come to the hands of the assignee, and where the bankrupt might apply for discharge after sixty days from his adjudication in bankruptcy. *Wood v. Hazen*, 15 N. B. R. 491; *In re Barrett*, 11 N. B. R. 527; 1 Cent. Law J. 556; Fed. Cas. 1,044; *In re Sloan*, 12 N. B. R. 59; 13 Blatchf. 67; Fed. Cas. 12,945; *In re Schenck*, 5 N. B. R. 93; Fed. Cas. 12,447.

66. B. filed his petition in bankruptcy on April 8, 1868, and on April 30 was adjudicated a bankrupt; on September 23 he applied for his discharge, the return of the assignee showing that on that day he had received and paid out moneys on account of the estate, and debts had previously been proved. *Held*, that the application having been prematurely filed the discharge must be refused. *In re Bodenheimer et al.*, 2 N. B. R. 133; 2 Amer. Law T. Rep. Bankr. 64; 1 Chi. Leg. News, 195; Fed. Cas. 1,594.

67. Where debts are proved and assets come into the hands of the assignee, the bankrupt need not apply for his discharge within one year from the adjudication of bankruptcy. *In re Holmes*, 14 N. B. R. 209; 3 N. Y. Wkly. Dig. 101; Fed. Cas. 6,634.

68. A discharge for which application is not made within a year after adjudication may be granted at the discretion of the court, upon explanation of the delay. *In re Canady*, 3 N. B. R. 3; 2 Biss. 75; 1 Chi. Leg. News, 113; Fed. Cas. 2,377.

69. Under section 29 of the bankrupt act of 1867, if there be a satisfactory excuse shown for the delay, the district court may grant an application by the bankrupt for a

discharge made more than a year after the commencement of proceedings in bankruptcy, where there are no assets. In re Donaldson, 11 N. B. R. 460; 2 Dill. 546; Fed. Cas. 3,982.

70. A voluntary bankrupt made application for a discharge more than two years after the date of the adjudication. The reason given for the delay was that, although he had diligently tried, he had been unable to get the consent in writing of a majority of his creditors as required. *Held*, that the excuse was not sufficient. In re Lowenstein, 18 N. B. R. 479; 3 Dill. 145; 3 Cent. Law J. 82; 33 Leg. Int. 360; Fed. Cas. 8,573.

71. A bankrupt must file his petition for discharge before the assignee renders his final account and is discharged. In re Cross, 16 N. B. R. 294; 25 Pittsb. Leg. J. 35; 5 Cent. Law J. 313; Fed. Cas. 3,427.

#### (b) *Second Application.*

72. Where a petition for a discharge was unseasonably made, and at the proper time another petition was filed, it was objected that the court had no jurisdiction to grant the discharge. *Held*, that the proceedings under the first petition were abandoned by filing the second, and that the objection was frivolous. In re White et al., 18 N. B. R. 107; Fed. Cas. 17,533; In re Svenson, 19 N. B. R. 229; 9 Biss. 69; 11 Chi. Leg. News, 367; 8 Reporter, 261; Fed. Cas. 13,659.

### VIII. PROCEEDINGS IN OPPOSITION TO.

#### (a) *In General.*

73. The filing of an opposition to a bankrupt's discharge is the commencement of an individual proceeding on the part of the creditor against the bankrupt. *Creditors v. Williams*, 4 N. B. R. 187; Fed. Cas. 3,879.

74. All objections to specifications in opposition to discharge should be raised by the exceptions first filed. In re Parker et al., 18 N. B. R. 43; 5 Sawy. 58; Fed. Cas. 10,724.

75. A firm having been adjudged bankrupt, individual creditors made application to have the adjudication set aside on the ground that the court had no jurisdiction. *Held*, that they should raise the question in opposition to the firm's discharge when ap-

plication therefor was made. In re Penn et al., 3 N. B. R. 145; 4 Ben. 99; Fed. Cas. 10,926.

76. Where, on the return of an order to show cause before a register why a bankrupt should not be discharged, a creditor opposes the discharge, the register must make a certificate of the proceeding, stating the opposition, and return the papers into court in like manner as if there were no opposition. In re Hughes, 1 N. B. R. 9; 2 Ben. 85; 1 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 6,841.

77. Upon an application for a discharge by a bankrupt under the act of 1867, the register must administer the final oath and grant the certificate of conformity, notwithstanding the discharge is opposed by creditors, in which event the certificate must except the particulars covered by the specifications. In re Pulver, 2 N. B. R. 101; 3 Ben. 65; 1 Chi. Leg. News, 139; Fed. Cas. 11,467.

78. It is discretionary with the court, when creditors opposing a discharge file a specification of the grounds of such opposition, to postpone the question of fact to be tried at a stated session of the court. *Coit v. Robinson et al.*, 9 N. B. R. 289; 19 Wall. 274.

79. The proceeding upon the order to show cause why the discharge should not be granted can be, on the return day of the order, adjourned by reason of the adjournment of the examination of the bankrupt. In re Mawson, 1 N. B. R. 41; 1 Amer. Law T. Rep. Bankr. 46; Fed. Cas. 9,320.

80. A motion was made by a creditor for further time in which to file specifications in opposition to discharge, and the same was opposed by the bankrupt on the ground that a compromise with his creditors had been accepted and approved by the court. *Held*, that the composition obviated a discharge, and the motion was overruled. In re Becket, 12 N. B. R. 201; 2 Woods, 173; 7 Chi. Leg. News, 243; Fed. Cas. 1,210.

81. The question whether a bankrupt has been guilty of fraud, or committed such act as would prevent his discharge, must be postponed until the hearing of the application for discharge. In re Brisco, 2 N. B. R. 78; 1 Gaz. 78; Fed. Cas. 1,886.

82. Where none of the specifications in opposition to discharge is sustained, the

bankrupt will be discharged and will be entitled to recover from the opposing creditors the cost of resisting the opposition to his discharge. In re Robinson & Chamberlain, 3 N. B. R. 17; Fed. Cas. 11,943.

83. The notice need say nothing of the second or third meeting of creditors if the bankrupt do not apply for his discharge within three months from the time of his being adjudged a bankrupt. Anon., 2 N. B. R. 630 (8 vo. ed.).

84. If no debts have been proved, and no assets have come to the hands of the assignee when the bankrupt applies for his discharge, the notice to be given will be by publication in the discretion of the court. Anon., 1 N. B. R. 122 (8 vo. ed.).

85. Notice need be mailed only to creditors who have proved their debts, when a discharge is applied for after sixty days from the adjudication in bankruptcy. In re McIntire, 1 N. B. R. 15 (8 vo. ed.).

86. The register may administer to the bankrupt the oath required by section 29 of the act of 1867, if no creditor appear in opposition to the discharge by the return day of the order. In re Bellamy, 1 N. B. R. 96 (8 vo. ed.).

### (b) *The Showing.*

87. The burden of proof is on the creditor filing specifications of objections to the discharge of the bankrupt. In re Okell, 2 N. B. R. 85; Fed. Cas. 10,475.

88. Where creditors object to the granting of a bankrupt's discharge on the ground that he put into his schedule a false or fictitious debt, the *onus probandi* is on such creditors to show that the debt was false and fictitious, and where there is a failure to substantiate the allegation a discharge will be granted. In re Orcutt, 4 N. B. R. 176; 5 Ben. 19; Fed. Cas. 10,550.

89. Creditors cannot produce proof concerning other than the particular acts charged in their specifications, even when such other acts are analogous. In re Rosenfeld, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; 8 Amer. Law Reg. (U. S.) 44; Fed. Cas. 12,057.

90. The creditor must show that the bankrupt has wilfully sworn falsely to prevent his discharge. Mere presumption of fraud or concealment is not sufficient. In re Hummitsh,

2 N. B. R. 8; 15 Pittsb. Leg. J. (O. S.) 494; Fed. Cas. 6,866.

91. A bankrupt who has not made a complete disclosure of his assets cannot require that creditors opposing his discharge specify objections, or abide by specifications which they may have filed. In re Long, 3 N. B. R. 66; 7 Phila. 578; 26 Leg. Int. 349; Fed. Cas. 8,477.

92. It is open to creditors on an application for a discharge to show that the ground of jurisdiction alleged in the petition for adjudication did not exist. In re Beals et al., 17 N. B. R. 108; 9 Ben. 223; Fed. Cas. 1,165.

93. In opposition to discharge, eleven specifications were urged, under each of which an issue of fact was raised, and upon evidence offered a *prima facie* case of fraud was established. Held, that the discharge should be withheld until the *prima facie* case established was overthrown. In re Doyle, 3 N. B. R. 190; Fed. Cas. 4,052.

## IX. JURISDICTION OF COURT OVER.

See COURTS, 59, 62, 100, 112, 197, 270.

94. Whether a bankrupt be entitled to a discharge pursuant to section 29 of the act of 1867 is a question to be decided by the district court under the conditions prescribed in that section. Coit v. Robinson et al., 9 N. B. R. 289; 19 Wall. 274.

95. There is no provision in the bankrupt act of 1867 for a jury trial on the question of discharge, and the circuit court acts by virtue of clause 1, section 2, of that act when it reviews decisions of the district court made in granting or refusing such discharge. Id.

96. A bankrupt court has jurisdiction to grant a discharge, even though there may be creditors who were not regularly brought before it by publication and service of notice. Thurmond v. Andrews and Wife, 13 N. B. R. 157.

97. An action was brought by a creditor, who had proved his claim in bankruptcy, three years after adjudication. No dividend had been paid, no final account rendered, and no discharge granted or refused. The defendant set up the pendency of bankruptcy proceedings. The plaintiff urged that the time having elapsed within which a discharge could be granted, the "proceedings" were

terminated and his right of action revived. *Held*, that the "proceedings" were not terminated without a discharge, and that the right of action was not revived. *Wood v. Hazen*, 15 N. B. R. 491.

98. A certificate of discharge in bankruptcy, signed by the judge and attested by the clerk under the seal of the court, is not only sufficiently authenticated, but it is precisely the means by which the bankrupt is to prove and have the benefit of his discharge. *Miller v. Chandler*, 17 N. B. R. 251.

## X. GRANT OF DISCHARGE.

### See BOOKS OF ACCOUNT.

#### (a) *In General.*

99. An involuntary bankrupt is entitled to a discharge under the same circumstances that would justify the discharge of a voluntary one. In *re Clark*, 3 N. B. R. 8; 2 Biss. 73; 1 Chi. Leg. News, 113; Fed. Cas. 2,800.

100. An involuntary bankrupt who has complied with all the provisions of the bankrupt act can apply for and receive a discharge of the same as a voluntary one. In *re Bunster*, 5 N. B. R. 82; 5 Ben. 242; 41 How. Pr. 406; Fed. Cas. 2,136.

101. Where proper notice has been given to creditors, they are regarded as consenting to a discharge if they make no opposition. In *re Antisdell*, 18 N. B. R. 289; Fed. Cas. 480, 490.

102. Where it appears that the bankrupt has committed an act that, if properly pleaded, will bar a discharge, the court will not of its own motion refuse the discharge. *Id.*

103. On application for a discharge it appeared that the bankrupt had violated Revised Statutes, section 5110, by giving fraudulent preferences, but no creditors appeared in opposition. *Held*, that the court would not deny a discharge where creditors were not opposed thereto. In *re Clark et al.*, 19 N. B. R. 301; 36 Leg. Int. 414; Fed. Cas. 2,812.

104. A discharge was opposed on the ground that notice of the appointment of the assignee was published three times in two weeks instead of once a week for three successive weeks as required by section 14 of the act of 1867. *Held*, not a ground for

refusing discharge. In *re Littlefield*, 3 N. B. R. 18; 1 Lowell, 331; 2 Amer. Law T. 122; 1 Amer. Law T. Rep. Bankr. 164; Fed. Cas. 8,398.

105. Failure to publish notice of appointment of an assignee is not cause for withholding a discharge. In *re Strachan*, 3 N. B. R. 148.

106. The fact that the bankrupt caused and permitted loss, waste and destruction of his estate and effects, and misspent and misused the same, prior to filing a petition, is no cause for refusing a discharge. In *re Rogers*, 3 N. B. R. 139; 1 Lowell, 423; Fed. Cas. 12,001.

107. Objection was made to the discharge of a bankrupt on the ground that the petition was filed by collusion between the bankrupt and the petitioning creditors. *Held* that, in the absence of fraud, the original adjudication was conclusive on all creditors and could not be disputed upon the question of granting a discharge. In *re Ordway Bros.*, 19 N. B. R. 171; 19 Alb. Law J. 482; Fed. Cas. 10,552.

108. An adjudication suffered by default will not prejudice the bankrupt in his application for a discharge. In *re Lathrop*, *Ludington & Co.*, 3 N. B. R. 11; 2 Amer. Law T. 124; Fed. Cas. 8,105.

109. A bankrupt's property was attached at the suit of a hostile creditor without his knowledge or consent, and he omitted to have himself adjudicated a voluntary bankrupt. *Held*, not sufficient to prevent discharge. In *re Belden*, 2 N. B. R. 14; 2 Amer. Law Rev. 771; 15 Pittsb. Leg. J. 547; Fed. Cas. 1,240.

110. I and P. having been adjudged bankrupts applied for a discharge. The court allowed a creditor to file objections, one being that the bankrupts were not *bona fide* residents of the state for six months prior to the filing of the petition. *Held*, that while the decree remains in force, the bankrupt's discharge cannot be opposed on the ground that facts stated in the petition as to residence are not true. In *re Ives & Porter*, 19 N. B. R. 97; 5 Dill. 146; Fed. Cas. 7,115.

111. In opposition to a bankrupt's discharge it was alleged that he had not resided in or carried on business in the district for the period of six months. *Held*, not a ground for opposition. In *re Burk*, 3 N. B. R. 76;



Deady, 425; 2 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 2,156.

112. Objection was made to the discharge of the bankrupt on the ground that he had promised certain creditors money to vote for a composition. *Held*, that such act, though of the description of offense under Revised Statutes, section 5110, could not be set up against the discharge of the bankruptcy by a decree of court. In re Morris & Morganstern, 19 N. B. R. 111; 19 Alb. Law J. 281; 26 Pittsb. Leg. J. 121; 36 Leg. Int. 215; Fed. Cas. 2,824.

113. A act of bankruptcy committed a long time before the passage of the bankrupt act of 1867 is no ground for refusing a discharge. In re Keefer, 4 N. B. R. 126; 3 Chi. Leg. News, 125; Fed. Cas. 7,636.

114. A voluntary bankrupt's discharge will not be barred by payments of money to preferred creditors, or by conveyances of property, before the passage of the bankrupt act of 1867, even though fraudulent. In re Hollenshade, 2 N. B. R. 651 (8 vo. ed.).

#### (b) *Despite Fiduciary Debt.*

115. That a debt is alleged to be a fiduciary one is not a ground for withholding a discharge, such debts being excepted from the operation thereof. In re Elliott, 2 N. B. R. 44; Fed. Cas. 4,391; In re Clarke, 2 N. B. R. 44; Fed. Cas. 2,844; In re Tracy et al., 2 N. B. R. 96; 1 Chi. Leg. News, 123; Fed. Cas. 14,124.

116. The fact that a debt was created by the fraud and embezzlement of the bankrupt, and while acting in a fiduciary capacity, is not a valid objection to the discharge, such debts not being thereby discharged. In re Bashford, 2 N. B. R. 26; Fed. Cas. 1,090.

#### (c) *Despite Fraudulent Debt.*

117. The fact that a debt is created by fraud does not constitute a ground of opposition to the discharge, such debts not being affected by the discharge. In re Wright, 2 N. B. R. 57; 36 How. Pr. 167; 2 Ben. 509; Fed. Cas. 18,065; In re Stokes, 2 N. B. R. 76; Fed. Cas. 18,476; In re Rosenfield, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618; 1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,053.

118. An objection to a discharge in bankruptcy grounded on the fact that the debt

was created by fraud is not a valid objection. In re Bashford, 2 N. B. R. 26; Fed. Cas. 1,090; In re Clark, 2 N. B. R. 44; Fed. Cas. 2,844.

119. Fraudulent buying, or buying when the purchaser knows he cannot pay for the goods bought, is no ground for refusing a discharge. In re Rogers, 3 N. B. R. 139; 1 Lowell, 423; Fed. Cas. 12,001.

120. The fact that a debt was created by fraud and the unlawful conversion of property furnishes no ground for withholding the discharge of a bankrupt. In re Doody, 2 N. B. R. 74; Fed. Cas. 3,995.

#### (d) *Despite Conveyance Without Fraud.*

See CONVEYANCES, 20.

121. Payments by an insolvent debtor in the ordinary course of business, with a *bona fide* expectation that he can continue business without going into bankruptcy, there being no actual design to prefer, will not bar a discharge. In re Seeley, 19 N. B. R. 1; Fed. Cas. 12,628.

122. A debtor who, prior to his bankruptcy, pays certain of his creditors, in a *bona fide* expectation of being able to continue his business and with no design to prefer such creditors, is not thereby deprived of his right to his discharge. In re Brent, 8 N. B. R. 444; 2 Dill. 129; 18 Int. Rev. Rec. 159; Fed. Cas. 1,832.

123. The payment of a debt through inadvertence or under a mistaken sense of duty, and without fraudulent intent, is insufficient to prevent discharge. In re Rosenfeld, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; 8 Amer. Law Reg. (U. S.) 44; Fed. Cas. 12,057.

124. A bankrupt petitioned for discharge, but the question was raised as to preferred creditors being paid a short time previous to bankruptcy. The evidence showed no fraud practiced or intended. A discharge was ordered. In re Burgess, 3 N. B. R. 47; Fed. Cas. 2,153.

125. Mere preferences made without contemplation of proceedings in bankruptcy cannot be set up against a discharge. In re Jones, 13 N. B. R. 286; 2 Lowell, 451; Fed. Cas. 7,446.

126. In opposition to the discharge of a bankrupt specifications were filed alleging

that he had given a fraudulent preference, contrary to the provisions of the act. Other allegations were not specific, and did not allege an intent to defraud or delay the operation of the bankrupt act. They were held to be insufficient. In *re Butterfield*, 14 N. B. R. 147; 5 Biss. 120; Fed. Cas. 2,247.

127. A general assignment for the benefit of creditors without preference and in good faith, sixteen days prior to the commencement of proceedings in bankruptcy, and pending adverse proceedings by a creditor, is not a bar to a bankrupt's discharge. In *re Pierce & Holbrook*, 8 N. B. R. 61; 26 Leg. Int. 332; 16 Pittsb. Leg. J. 204; Fed. Cas. 11,141.

128. When a bankrupt's discharge is opposed on the grounds of false swearing, of attempt to conceal property, and of transfer of a portion to a creditor with intent to give preference, a discharge will be granted when the evidence shows that the bankrupt had no interest therein and that the transfer was without fraud. In *re Penn et al.*, 5 N. B. R. 288; Fed. Cas. 10,929.

#### (e) *Omission from Schedule.*

129. The mere omission of the name of a creditor from the schedule of the bankrupt is not a substantive ground for preventing or avoiding the discharge as to such creditor, unless the omission were wilful and fraudulent. *Payne & Bro. v. Able et al.*, 4 N. B. R. 67.

130. It is not necessary that in the schedule be included the bankrupt's right to his share of the net profits of a business of another, conducted by him in his own name, and the omission is not ground for opposing a discharge. In *re Beardsley*, 1 N. B. R. 121; Fed. Cas. 1,184.

131. Unless there was a design to conceal the property, where it has been transferred, an omission to place it in the schedule is not a ground for refusal of discharge. In *re Smith*, 13 N. B. R. 256; 1 Woods, 478; Fed. Cas. 12,995.

132. Where the discharge of a bankrupt was opposed on the ground that he had omitted certain property from his schedule, claimed to have been fraudulently conveyed, and it appeared that after such conveyance and before the filing of the petition a receiver had been appointed by a state court, *held*,

that whatever title the bankrupt had in the property, after the conveyance, vested in the receiver, and there was no false swearing by reason of his not having inserted it in the schedule. In *re Freeman*, 4 N. B. R. 17; 4 Ben. 245; Fed. Cas. 5,082.

#### (f) *Sufficient Assets or Assent.*

133. When a majority in number and value of those creditors of a bankrupt whose debts were contracted after the 1st of January, 1869, have, in writing, assented to his discharge, he will, under the act of 1867, be discharged from all provable debts, whether contracted before or after that date. In *re Hershman*, 7 N. B. R. 604; Fed. Cas. 6,430.

134. In ascertaining the number and value of creditors whose assent is necessary to obtain a discharge, under the act of 1867, in the absence of assets, those whose debts arose prior to January 1, 1869, are not to be counted. In *re Wheeler et al.*, 16 N. B. R. 277; 10 Chi. Leg. News, 18; 5 N. Y. Wkly. Dig. 202; 5 Cent. Law J. 368; Fed. Cas. 17,489.

135. No assent of any class of creditors is necessary to a discharge of a bankrupt from debts contracted before January 1, 1869. In *re Pierson*, 10 N. B. R. 193; Fed. Cas. 11,154.

136. Where a bankrupt applies for his discharge, his assets not being equal to fifty per cent. of the claims proved against his estate which were contracted since January 1, 1869, *held*, that he will be discharged from all debts provable against his estate which were contracted prior to that time. In *re Seay*, 4 N. B. R. 82; 4 Amer. Law T. 16; 1 Amer. Law T. Rep. Bankr. 244; Fed. Cas. 12,597.

137. A bankrupt who has otherwise complied with the requirements of the bankrupt act of 1867 is entitled to a discharge, if it satisfactorily appear that at the time he filed his petition his assets equaled fifty per cent. of the amount of the debts proved against him. In *re Lincoln and Cherry*, 7 N. B. R. 334; 20 Pittsb. Leg. J. 1; 3 Pittsb. Rep. 440; Fed. Cas. 8,353.

138. An involuntary bankrupt, having surrendered his assets, is not entitled to a certificate of conformity under the act of 1867, if they do not equal fifty per cent. of the claims proven against his estate, unless at or before the time of hearing on his applica-

tion for discharge he tenders the assent in writing of a majority in number and value of his creditors. In *re Bunster*, 5 N. B. R. 82; 5 Ben. 242; 41 How. Pr. 406; Fed. Cas. 2,136; In *re Graham*, 5 N. B. R. 155; 28 Leg. Int. 317; Fed. Cas. 5,661; In *re Pierson*, 10 N. B. R. 193; Fed. Cas. 11,154; In *re Vinton*, 7 N. B. R. 138; Fed. Cas. 16,951.

139. A bankrupt filed his petition on June 8, 1868, and applied for his discharge, notwithstanding his assets would not pay fifty per cent. of the claims, and no written assent thereto of a majority of creditors who have proved their claims was filed. *Held*, that the act of July 27, 1868, amending the thirty-third section of the act of 1867, is retroactive in its effect as to all cases in which proceedings commenced prior to January 1, 1869, and a discharge should be granted. In *re Billing*, 2 N. B. R. 161; 3 Ben. 212; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 1,408.

140. A bankrupt whose petition was filed under the act of 1867 subsequent to January 1, 1869, owed debts contracted prior to that date and others subsequent. He applied to be discharged from all his debts and showed that his assets were equal to fifty per cent. of the debts contracted after January 1, 1869, but were not that percentage of *all* the claims proved against his estate on which he was liable as principal debtor. He was discharged as to those contracted before but not as to those after that date. In *re Shower*, 6 N. B. R. 586; 4 Chi. Leg. News, 299; Fed. Cas. 12,816.

141. There were no opposing interests; the assets were equal to fifty per cent. of the claims proved on account of debts and liabilities contracted subsequent to January 1, 1869, upon which the bankrupt was liable as principal debtor. The assent in number and value of creditors who had proved their claims on debts contracted subsequent to January 1, 1869, had not been filed. *Held*, that under the amendments to the bankrupt act approved July 27, 1868, and July 14, 1870, he was entitled to his discharge. In *re Rockwell et al.*, 4 N. B. R. 74; Fed. Cas. 11,987.

142. The assignee of a bankrupt under the act of 1867 who had applied to be discharged testified that when he took possession of the estate it was worth more than fifty per cent. of the debts. The estate was, however heavily incumbered, and when the property was sold

it brought much less than fifty per cent. No assent of creditors was filed. *Held*, the bankrupt was entitled to discharge only of those debts contracted prior to January 1 1869. In *re Van Riper*, 6 N. B. R. 573; Fed. Cas. 16,874.

143. The funds in the hands of an assignee before deduction of costs and expenses exceeded fifty per cent. of the debts proven, but after paying costs, etc., was less than that proportion. The bankrupt applied for his discharge under section 33 of the act of 1867 without the assent of his creditors. *Held*, entitled thereto. In *re Kahley*, 6 N. B. R. 189; 3 Biss. 169; 4 Chi. Leg. News, 121; 5 Amer. Law T. Rep. 175; Fed. Cas. 7,594.

144. To entitle a voluntary bankrupt to a discharge, in the absence of the assent of creditors, the proceeds of his property, in the hands of the assignee, subject to be divided among his creditors must, at the time of hearing of the application for discharge, be equal to fifty per centum of the then amount of the claims proved against his estate, on which he was liable as principal debtor (act of 1867). In *re Webb & Taylor*, 8 N. B. R. 177; 2 Chi. Leg. News, 313; Fed. Cas. 17,314.

145. W. was adjudged bankrupt on the petition of his partner, and after a time applied for a discharge but filed no assent of creditors, and had not paid a sufficient dividend to dispense with the assent. *Held*, he was not entitled thereto. In *re Wilson*, 13 N. B. R. 253; 2 Lowell, 453; Fed. Cas. 17,784.

146. Bankrupts, in both voluntary and involuntary cases commenced prior to June 22, 1874, may be discharged without reference to the question of the amount of assets or the number of creditors, provided they comply with the law in other respects (1867). In *re Perkins*, 10 N. B. R. 529; 6 Biss. 185; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 135; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 43; Fed. Cas. 10,983.

147. A debtor adjudged an involuntary bankrupt in June, 1872, did not petition for discharge until after the passage of the amendment of June 22, 1874. *Held*, he was not entitled to a discharge unless he complied with the fifty per centum clause of the act of 1868; and *held*, that the amendment of June, 1874, is not retrospective so as to affect discharges to be granted in cases where adjudication was had prior to December 1,

1893. In re Francke and Francke, 10 N. B. R. 438; 7 Ben. 420; 6 Chi. Leg. News, 414; 3 Amer. Law Rec. 298; Fed. Cas. 5,046.

148. In order to obtain a discharge under section 33 of the act of 1867, as amended June 22, 1874, when the assets do not equal thirty per cent. of the claims proved, it is necessary to obtain the consent in writing of one-fourth in number and one-third in value of the creditors to whom the debtor has become liable as principal debtor, and who have proved their claims. Such assent may be filed at or before the hearing on the application for discharge. In re Derby, 12 N. B. R. 241; 8 Ben. 118; 4 Amer. Law Rec. 23; Fed. Cas. 3,816.

149. A bankrupt filed a petition for discharge without the assent of creditors, his assets not equaling thirty per cent. Action was suspended by the court to permit the assent of creditors to be procured. Subsequently the bankrupt asked leave to file proof of debts and the assent of other creditors. *Held*, that the petition must be submitted on the case existing on the return day, and leave to file said proofs was refused (act of 1867). In re Seaman, 19 N. B. R. 332; Fed. Cas. 12,580.

150. A bankrupt applied for discharge, there being no assets equal to thirty per cent., having secured the consent of one-fourth of his creditors in number and one-third in value. *Held*, that he was entitled to a discharge irrespective of the time when the debts were incurred (act of 1867). In re Wheeler, 19 N. B. R. 258; 11 Chi. Leg. News, 407; 8 Reporter, 674; 4 Cin. Law Bul. 655; Fed. Cas. 17,491.

151. In cases of involuntary bankruptcy, the bankrupt may receive a discharge under the act of 1867, if otherwise entitled thereto, without paying any proportion of his debts and without procuring the assent of any portion of his creditors, while in case of voluntary bankruptcy under said act no discharge can be granted to a debtor whose assets are not equal to thirty per cent. of the claims proved against his estate, upon which he is liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value. In re Duncan et al., 14 N. B. R. 18; 8 Ben. 365; Fed. Cas. 4,131.

152. Section 9 of the act of June 22, 1874, concerning the conditions upon which a dis-

charge is to be granted, applies to cases pending when the act was passed, although such act is not retrospective in a legal sense. In re Griffiths, 10 N. B. R. 456; 2 Lowell, 840; 1 Cent. Law J. 507; 10 Alb. Law J. 249; 1 Amer. Law T. Rep. 476; Fed. Cas. 5,825.

## XI. REFUSAL OF DISCHARGE.

### See BOOKS OF ACCOUNT.

#### (a) *In General.*

153. The courts are as much bound by the provisions of the bankrupt act as the bankrupt himself, and, if it appear in the regular course of proceeding that an applicant for a discharge has failed in any particular to perform his duty as a bankrupt, the application must be refused. In re Palmer, 14 N. B. R. 437; 2 Hughes, 177; Fed. Cas. 10,678.

154. If the record disclose that the bankrupt has been guilty of fraud, a discharge will be withheld, though no creditor appear in opposition. In re Sohoo, 3 N. B. R. 52; Fed. Cas. 13,162.

155. The court will refuse a discharge where it appears, upon an inspection of the record, that the bankrupt is not entitled thereto, although there are not objections interposed by creditors. In re Wilkinson, 3 N. B. R. 74; 2 West. Jur. 350; 16 Pittsb. Leg. J. 237; Fed. Cas. 17,667.

156. If there be an omission to enter an order refusing a discharge, the bankrupt court may make it *nunc pro tunc*, if no rights of third persons have intervened which can be thereby prejudiced. In re Drisco et al., 14 N. B. R. 551; Fed. Cas. 4,086.

157. F., a bankrupt, applied for a discharge, but the proofs of debt had been lost. *Held*, that he could not be legally discharged until they were supplied. In re Friedlob, 19 N. B. R. 122; 11 Chi. Leg. News, 199; Fed. Cas. 5,118.

158. An order was issued by the register, requiring the wife of a bankrupt to attend and be examined in relation to the bankruptcy at the time and place specified therein, which was served on the bankrupt, but not on the wife, who failed to attend. *Held*, that the bankrupt was not entitled to a discharge in the absence of proof that he was unable to procure the attendance of his wife.

In re Van Tuyl, 2 N. B. R. 177; 3 Ben. 237; 1 Chi. Leg. News, 326; Fed. Cas. 16,879.

159. A bankrupt who has been ordered to submit to further examination at a specified time and departs from the district before the time arrives will not be discharged until he has submitted thereto. In re Kingsley, 16 N. B. R. 301; Fed. Cas. 7,820.

160. The fact that a discharge has been refused is not an absolute bar to a composition. And the fact that a petition to review an order refusing a discharge is pending does not deprive the court of jurisdiction to entertain proceedings for a composition. In re Odell et al., 16 N. B. R. 501; 9 Ben. 247; Fed. Cas. 10,427.

161. One cannot be discharged from his liabilities as a member of the firm unless the debts and assets of the firm are considered and adjudicated upon by the same court. Corey et al. v. Perry et al., 17 N. B. R. 147.

162. A, B, C. & D. were partners. A. sold to B, C. & D. and retired, leaving assets and debts in the hands of the new firm. Part of the assets were used to pay part of the debts. A. filed a petition as an individual, and B, C. & D. as a firm. All had a common assignee. A. had no individual debts. His application for a discharge was refused, the court holding that the assignee had no jurisdiction over the assets of the firm of A., B., C. & D., there never having been a formal assignment to the new firm. In re Plumb, 17 N. B. R. 76; 9 Ben. 279; Fed. Cas. 11,231.

163. An adjudication in bankruptcy was made on the 22d of December, 1873. On the 20th of May, 1876, the assignee was discharged, his accounts having been settled, in accordance with section 5096, Revised Statutes. The bankrupt petitioned for a discharge on November 13, 1876. The court held that the application therefor must be made before the administration of the estate was completed and refused to grant it. In re Brightman et al., 15 N. B. R. 213, 216; 14 Blatchf. 180; Fed. Cas. 1,878; sec. 5108, R. S.

164. The refusal of an application for discharge from bankruptcy under the act of 1867, on the ground that it was not made within one year from the date of adjudication, is not a bar to the filing of a new petition. In re Farrell, 5 N. B. R. 125; Fed. Cas. 4,680.

### (b) *Fraudulent Conveyance.*

165. A discharge will be refused where it appears that the bankrupt fraudulently preferred one of his creditors, although such preference was given under advice of counsel and the creditor voluntarily surrendered the security to the assignee. In re Finn, 8 N. B. R. 525; Fed. Cas. 4,795.

166. A payment by a bankrupt, knowing himself to be insolvent, of a debt not contracted in the course of trade and without the creditor's knowledge of insolvency, constitutes a fraudulent preference, and is a ground for withholding a discharge. In re Gay, 3 N. B. R. 114; 1 Hask. 108; 1 Amer. Law T. Rep. Bankr. 73; 2 Amer. Law T. Rep. Bankr. 52; Fed. Cas. 5,279.

167. An assignment of a claim to secure a pre-existing indebtedness, and not as a pledge of security made at the time of contracting the indebtedness and as a part of the transaction, made when insolvent and in contemplation of bankruptcy, is a fraudulent preference, and ground for withholding a discharge. In re Foster, 2 N. B. R. 81; 1 Amer. Law T. Rep. Bankr. 127; 1 Chi. Leg. News, 103; Fed. Cas. 4,901.

168. If a debtor be cognizant of his own insolvent condition, and expects to stop payment, and makes a payment or gives security to a creditor for a just debt with a view to give a preference, such act is fraudulent as against creditors, and property thus transferred may be recovered by the assignee, and a discharge will be denied. In re Gregg, 4 N. B. R. 150; Fed. Cas. 5,707.

169. Only those preferences which are forbidden and made void by the thirty-fifth section, and the clause of the twenty-ninth section referring to preferences in contemplation of bankruptcy, are considered grounds for withholding a bankrupt's discharge. The two classes of cases in the thirty-fifth section concern preferences within four and six months before proceedings in bankruptcy (1867). In re Pierson, 10 N. B. R. 107; Fed. Cas. 11,153.

170. An assignment for the benefit of creditors without preference, but with intent to prevent the distribution of property under the provisions of the bankrupt law, is sufficient ground for refusing a discharge in

subsequent voluntary proceedings in bankruptcy. In *re* Goldschmidt, 3 N. B. R. 41; 8 Ben. 379; Fed. Cas. 5,520.

171. A general assignment of all property to a private assignee for the benefit of creditors, a few days before filing a petition in bankruptcy, is, in the absence of confirmatory evidence of a change of circumstances, ground for withholding a discharge. In *re* Brodhead, 2 N. B. R. 93; 3 Ben. 106; 1 Chi. Leg. News, 107; Fed. Cas. 1,918.

172. A discharge will be refused a bankrupt who is shown to have been doing business in the name of his wife with the intention of evading the act. In *re* Hill, 1 N. B. R. 114; 2 Ben. 349; 1 Amer. Law T. Rep. Bankr. 56; Fed. Cas. 6,483.

173. An insolvent debtor who, four months prior to filing a petition in bankruptcy, conveyed a portion of his property to his wife, is not entitled to a discharge. In *re* Adams, 3 N. B. R. 139; Fed. Cas. 43.

174. Creditors objected to a discharge on the ground that the bankrupt had made a fraudulent conveyance of his property. *Held*, that if such conveyance were made at a time so recent that it would affect any of the creditors who could come under the bankruptcy, the discharge should be refused. In *re* Jones, 13 N. B. R. 286; 2 Lowell, 451; Fed. Cas. 7,446.

175. A debtor's liabilities exceeded his assets and he had ceased to meet his liabilities as they came due, but for a month he continued business and paid money to two creditors. *Held*, such payment constituted a preference that defeated a discharge under section 29 of the act of 1867. In *re* Warner et al., 5 N. B. R. 414; Fed. Cas. 17,177.

176. A firm had made a general assignment for the benefit of creditors. A member withdrew from the assignee certain articles claimed as exemptions. A homestead in his wife's name had been paid for partly by the wife and partly by money from the firm's earnings. In voluntary proceedings the firm was refused a discharge. In *re* Croft Brothers, 17 N. B. R. 324; 6 N. Y. Wkly. Dig. 218; 8 Biss. 188; 10 Chi. Leg. News, 204; 6 Amer. Law Rep. 597; Fed. Cas. 3,404.

177. Section 29 of the act of 1867 refuses a discharge on the ground of preference only when the act is brought within the definition of section 35 or section 39 of the act. Under the latter section it must be proved that

bankruptcy was in contemplation, and under the former that the creditor was a party to the fraud. In *re* Locke, 2 N. B. R. 123; 1 Lowell, 293; Fed. Cas. 8,439.

178. When a discharge is refused on the ground of the bankrupt having given a preference, he is a trustee for his creditors. In *re* Doyle, 3 N. B. R. 153; Fed. Cas. 4,051.

### (c) *Omission from Schedule.*

179. The discharge of the bankrupt was opposed by a creditor who averred that the evidence showed that the bankrupt had omitted from his schedules certain property, and that with fraudulent intent he had placed his property in the hands of his wife. The discharge was refused. In *re* Hill, 1 N. B. R. 114; 2 Ben. 349; 1 Amer. Law T. Rep. Bankr. 56; Fed. Cas. 6,483.

180. A discharge will be refused where the bankrupt wilfully swears falsely in the affidavit annexed to his schedule in stating that he has no assets, and when he has concealed his property and has been guilty of fraud in not delivering it to his assignee. In *re* Rathbone, 1 N. B. R. 145; 1 Amer. Law T. Rep. Bankr. 70; Fed. Cas. 11,583.

181. The retention of the possession of chattels by a vendor after the sale thereof is conclusive evidence of fraud as against his creditors, and the failure to include such property in his schedule at the time of filing his petition in bankruptcy, or otherwise disclose his interest therein, is concealment thereof, and ground for withholding a discharge. In *re* Hussman, 2 N. B. R. 140; 2 Amer. Law T. Rep. Bankr. 53; 1 Chi. Leg. News, 177; Fed. Cas. 6,951.

182. The possession of assets in the use of a bankrupt, though by a defeasible title, makes a sufficient title for his assignee until it shall be successfully disputed, and the omission of such assets from his schedule is a concealment thereof, and ground for refusing a discharge. In *re* Beal, 2 N. B. R. 178; 1 Lowell, 323; 2 Amer. Law T. Rep. Bankr. 95; 1 Chi. Leg. News, 326; Fed. Cas. 1,156.

183. Concealment of an estate, to furnish grounds for opposing the discharge of a bankrupt, must be wilful and coupled with an intent to deceive. In *re* Sidle, 2 N. B. R. 77; Fed. Cas. 12,844.

184. A discharge will not be granted a

bankrupt when he has omitted from his schedule of assets an estate in expectancy under a will, but leave will be granted to amend. In re Connell, Jr., 3 N. B. R. 118; Fed. Cas. 3,110.

185. It must appear that the bankrupt knew the claim was false, in order to bar a discharge on the ground that he swore falsely in the affidavit accompanying his schedule that he was indebted to the creditors named therein, or that he did not disclose to the assignee that the claim was false. In re Blumenthal, 18 N. B. R. 555; Fed. Cas. 1,575.

(d) *Insufficient Assets.*

186. When at the time of the application for a discharge the assignee has neither received nor paid any moneys on account of the estate, the case is regarded as one in which no assets have come into his hands. In re Dodge, 1 N. B. R. 115; 2 Ben. 347; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 3,947.

187. An application for discharge under the act of 1867 must be refused if the assets do not equal fifty per cent. of the proved debts, and there is no assent in writing of a majority in number and value of the creditors. In re Borden & Geary, 5 N. B. R. 128; 5 Ben. 228; Fed. Cas. 1,654.

188. Where the assets of a voluntary bankrupt do not equal thirty per cent. of the claims proved against his estate, and upon which he may be liable as principal debtor, and he has not obtained the consent of one-fourth of his creditors in number and one-third in value, his application must be refused (act of 1867). In re Cert, 11 N. B. R. 143; 7 Chi. Leg. News, 79; Fed. Cas. 2,556.

189. A voluntary petition was filed, and an adjudication followed. Debts were proved on which the bankrupt was liable as principal debtor. No assets were found. *Held*, that no discharge could be granted. In re Gifford, 16 N. B. R. 135; Fed. Cas. 5,408.

190. Partners were declared involuntary bankrupts; an assignee was appointed and the estate wound up; all secured debts were paid, but not the unsecured; the bankrupt filed a petition for discharge, but could not secure the consent in writing of creditors, though no opposition was made. The district court refused to grant a discharge.

*Held*, section 9 of act approved June 22, 1874, applies to cases commenced before the act took effect and not concluded as well as to cases commenced after its passage. In re King, 10 N. B. R. 566; 3 Dill. 8; 1 Cent. Law J. 506; 7 Chi. Leg. News, 26; 10 Alb. Law J. 249; Fed. Cas. 7,781.

191. Property acquired in gaming is assets, which, if lost in gaming by the bankrupt, prevents his discharge. In re Marshall, 4 N. B. R. 27; 1 Lowell, 462; Fed. Cas. 9,123.

(e) *Death of Bankrupt.*

See DEATH, 4

192. If the debtor die after the issue of the warrant in bankruptcy, the proceedings cannot be continued and concluded, and a discharge granted in like manner as if he had lived. In re O'Farrell et al., 2 N. B. R. 154; 3 Ben. 191; 2 Amer. Law T. 106; 1 Amer. Law T. Rep. Bankr. 159; Fed. Cas. 10,446.

193. A bankrupt died five months after filing his petition, and his attorney asked for a discharge on account of death. *Held*, the discharge could not be granted because the bankrupt had not taken the necessary oath provided for in the twenty-ninth section of the act of 1867 prior to his decease. In re Gunika, 4 N. B. R. 23; 2 Chi. Leg. News, 367; 1 Pac. Law Rep. No. 8, p. 3; Fed. Cas. 5,868.

(f) *Influencing Creditor's Consent.*

194. A discharge will be refused where the bankrupt has influenced the action of a creditor in giving his assent to the discharge by a pecuniary consideration. In re Mawson, 1 N. B. R. 153; 2 Ben. 412; Fed. Cas. 9,319.

195. If a claim be purchased in behalf of the bankrupt with no motive but to benefit him, and the assent of a creditor to a discharge is used to influence other creditors, the discharge will be refused. In re Whitney et al., 14 N. B. R. 1; 2 Lowell, 455; 8 Chi. Leg. News, 195; Fed. Cas. 17,580.

196. Where the signature of a creditor is obtained by money, the act constitutes a fraud upon creditors, independently of any clause in a statute, and without regard to who has made the payment. *Id.*

197. A bankrupt whose assets were not sufficient to entitle him to a discharge ob-

tained the necessary consent of the proper number of creditors under the act of 1867. To obtain the consent of another creditor to strengthen his application, he gave him a note for \$40 with security, and in consideration the creditor consented to the discharge. Another creditor opposed the discharge because of the transaction, and it was refused. *In re Palmer*, 14 N. B. R. 487; 2 Hughes, 177; Fed. Cas. 10,678.

198. An agreement by which a creditor is to be paid in full in consideration of his consenting to a discharge is void. Instruments in furtherance of it, though executed by third parties in ignorance of it, are void. *Blasdel v. Fowle et al.*, 17 N. B. R. 412.

## XII. STAY OF PROCEEDINGS PENDING.

See *STAY OF PROCEEDINGS*, 14, 15.

199. An action against a bankrupt to recover a debt provable against his estate must be stayed until the question of his discharge is determined, notwithstanding the debt may not thereby be barred. *In re Rosenberg*, 2 N. B. R. 81; 3 Ben. 14; 1 Chi. Leg. News, 103; Fed. Cas. 12,054.

200. A suit at law to collect a debt, claim or liability from a bankrupt may be restrained until the application for a discharge, if made and prosecuted with reasonable diligence, has been determined; and where the discharge would be a bar to such suit the creditor must go into the bankruptcy court and oppose a discharge in the manner prescribed. *In re Archenbrow*, 11 N. B. R. 149; 7 Chi. Leg. News, 99; Fed. Cas. 504.

201. Leave will be granted to begin an action for a debt to which the bankrupt's discharge would not be a bar, if it appear that if not commenced forthwith the statute of limitations might run against it, or that service might not be obtained upon the bankrupt afterwards, or that testimony might be lost; and the court will then stay the suit to await the determination of the question of the bankrupt's discharge or the expiration of a reasonable time to make application therefor. *In re Ghirardelli*, 4 N. B. R. 42; 1 Sawy. 348; Fed. Cas. 5,376.

202. W. sued C., a bankrupt, after bankruptcy, to recover certain goods or their value. *Held*, that the action must be stayed pending the question of the bankrupt's dis-

charge so far as the action was for recovery of a money judgment. *In re Cohen*, 19 N. B. R. 133; Fed. Cas. 2,961.

203. The provisions of section 21 of the bankrupt act of 1867 relative to staying proceedings to await the determination of the bankrupt court on the question of discharge do not apply to corporations, which, under the terms of the act, can never receive a discharge. *Meyer v. Aurora Ins. Co.*, 7 N. B. R. 191.

204. The superior court refused a stay of proceedings and ordered judgment upon an attachment suit asked on the ground of proceedings in bankruptcy. It was held on bill of exceptions that sufficient time had not elapsed for the bankrupts to obtain their discharge, and the exceptions were sustained. *Ray et al. v. Wight*, 14 N. B. R. 563.

205. A debtor who neglected to apply for a stay of proceedings pending his application for a discharge may, nevertheless, after discharge, apply for a stay supplementary to judgment, when the claim of the plaintiff is affected by discharge. *The World Co. v. Brooks*, 3 N. B. R. 146.

206. Where the bankrupt is held under arrest and proceedings are pending against him in state courts, such proceedings will be stayed and he will be discharged from arrest in proper cases, to await the determination of the question of his discharge. *In re Jacoby*, 1 N. B. R. 118 (8 vo. ed.).

207. A delay of fourteen months after the presentation of a petition to review a decision upon a question arising in reference to a discharge, in bringing the matter to a hearing, is unreasonable, and a stay of proceedings in a state court will be vacated. *In re Belden*, 6 N. B. R. 443; 5 Ben. 476; Fed. Cas. 1,280.

## XIII. APPLICATION TO ANNUL.

### (a) *In General.*

See *CONFLICT OF LAWS*, 6.

208. That which would prevent a discharge will also invalidate one if the appropriate remedy be sought. *In re Rainsford*, 5 N. B. R. 381; Fed. Cas. 11,537.

209. Two years after receiving his discharge a bankrupt cannot be compelled to submit to an examination for the purpose of instituting or aiding a proceeding to vacate



this discharge. In re Dole, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,965.

210. Conveyances made by a bankrupt and alleged to be fraudulent cannot be shown in evidence, unless charged in the specifications in the petition to set aside the discharge, except to show the intent of certain acts specified in the petition. Tenny & Gregory v. Collins, 4 N. B. R. 156; Fed. Cas. 13,833.

211. A discharge obtained by fraud was annulled and the cause was referred to the register, who took testimony offered by the bankrupt and excepted to by the petitioner. The objection was referred to the court, and without additional evidence, and without notice to counsel, an order was passed vacating the decree which annulled the discharge. *Held*, that all parties affected should have had notice. In re Augenstein, 16 N. B. R. 252.

(b) *When Must be Made.*

212. A motion was made after the time allowed by the rule of court, to set aside a discharge because the party making the motion had no knowledge that the discharge had been granted. The motion was denied. In re Buchstein, 17 N. B. R. 1; 9 Ben. 215; Fed. Cas. 2,076.

213. A suit to set aside a discharge of a bankrupt must be brought within two years from the date of the discharge. Pickett, Ass., v. McGavick, 14 N. B. R. 236; 3 Cent. Law J. 303; 13 Alb. Law J. 218, 400; 2 N. Y. Wkly. Dig. 378; Fed. Cas. 11,126.

214. On application to amend a discharge, *held*, that the limitation in Revised Statutes, section 5120, in relation to proceedings to amend a discharge, is absolute, and that the time begins to run from the date of discharge, and not from the discovery of fraud. In re Brown, 19 N. B. R. 812; Fed. Cas. 1,983.

215. A creditor appealed to the supreme court to have a bankrupt's discharge impeached, subsequent to the state statutory period of two years allowed to test the validity of the same. *Held*, that impeachment in a state court for any of the reasons which would prevent the district court from granting it could not be had. Alston v. Robinett, 9 N. B. R. 74.

216. The discharge is the judgment of the court and stands upon the footing of other judgments. Opportunity is offered to contest it, and, if not availed of in the mode and within the time allowed, all remedy to annul it is cut off. Stevens v. Brown, 11 N. B. R. 568.

217. The discharge of the bankrupt is conclusive of the regularity of the proceedings, and can be attacked only in the court granting it, upon proceedings for that purpose, commenced within two years from its date and for some of the causes mentioned, unknown to the attacking party when it was granted. In re Witkowski, 10 N. B. R. 209; Fed. Cas. 17,920.

218. A creditor of a bankrupt, who had filed objections to his discharge, was prevented by a sudden and overpowering accident from attending the hearing, whereupon the order of discharge was issued. Soon after, and in the same term, the creditor filed a petition to rescind the order and recall the discharge. *Held*, that the court had the power so to do. In re Dupee, 6 N. B. R. 89; 2 Lowell, 18; Fed. Cas. 4,183.

(c) *Where Must be Made.*

219. Where a district court has granted a discharge, it has sole jurisdiction of proceedings to annul it. Nicholas, Ass., v. Murray et al., 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

220. The court overlooked specifications filed by a creditor and granted a discharge without considering them. *Held*, it was a proper subject of review by the circuit court. In re Buchstein, 17 N. B. R. 1; 9 Ben. 215; Fed. Cas. 2,076.

221. Where a creditor wishes to avoid the discharge in bankruptcy on the ground that his claim was not included in the schedule of indebtedness, he must attack the discharge on the ground of fraud in the court where granted. Symonds v. Barnes, 6 N. B. R. 377.

222. The authority to set aside a discharge in bankruptcy, conferred upon the federal courts by section 34 of the bankrupt act of 1867, is incompatible with the exercise of the same power by a state court; and the former is paramount. Corey v. Ripley, 4 N. B. R. 163.

(d) *Denied.*

See CLAIMS, 220.

223. A petition to set aside a discharge will not be entertained in regard to a matter which is not barred by the discharge. *In re Mansfield*, 6 N. B. R. 388; Fed. Cas. 9,040.

224. It is not necessary to give jurisdiction to the bankrupt court that the creditors have actual notice, and the lack of it will not make the discharge invalid if it be found that the requirements of the act were honestly complied with by the bankrupt. *Rayl, Adm'x, v. Lapham*, 15 N. B. R. 508.

225. On motion to vacate a discharge, *held*, that a new trial of specifications against discharge is not authorized by Revised Statutes, section 5120, after the discharge has been granted, even if the opposing creditor can adduce new facts. *In re Corwin*, 19 N. B. R. 422; Fed. Cas. 3,259.

226. A creditor sought to set aside a debtor's discharge. The testimony relied on was known to him before the discharge was granted. *Held*, that he had no standing in court. *In re Marrienneaux*, 13 N. B. R. 222; 1 Woods, 37; Fed. Cas. 9,088.

227. After the bankrupt's discharge a creditor moved to have it annulled on the grounds that the creditor had no notice of bankruptcy, that the bankrupt wilfully omitted assets from his schedule, and had admitted false claims against him. The bill was dismissed for want of evidence to support it. *In re Stetson*, 8 N. B. R. 179; 4 Ben. 147; Fed. Cas. 18,881.

228. A motion was made to set aside a discharge after the bankrupt had acted on it and after the time allowed by the rule of court, on the ground that the court had overlooked specifications filed by a creditor. The motion was denied. *In re Buchstein*, 17 N. B. R. 1; 9 Ben. 215; Fed. Cas. 2,076.

(e) *Granted.*

229. If, by wilfully making a false schedule or affidavits, the bankrupt prevents notice to a creditor, his discharge may be annulled. *Rayl, Adm'x, v. Lapham*, 15 N. B. R. 508.

230. A discharge granted a bankrupt will be set aside if it appear that he swore falsely in scheduling his creditors, and that a creditor thus omitted from the schedule did not

know of the act until after the discharge was granted. *In re Herrick*, 7 N. B. R. 841; Fed. Cas. 6,419.

231. A bankrupt was shown to have possessed property, of which he gave no account; no assets came into the hands of the assignee; and his wife, when interrogated as to how she came to have a large sum of money, refused to give explanation. *Held*, that the discharge had been obtained by fraud and should be annulled. *In re Augenstein*, 16 N. B. R. 252.

## XIV. DEBTS NOT RELEASED BY.

(a) *In General.*

232. In an action on a judgment recovered prior to discharge the defendant pleaded his discharge, to which the plaintiff replied that the defendant had concealed valuables and had not included them in his schedule. *Held*, that the creditor was entitled to set up such fraudulent concealment. *In re Perkins v. Gay*, 3 N. B. R. 189.

233. A discharge under the foreign bankruptcy law is not a bar to an action on a contract made in this country. *McMillan v. McNeil*, 4 Wheat. 209.

234. A certificate of discharge in bankruptcy is not a bar to a suit against a bankrupt by a creditor who was not named in the schedule accompanying the petition in the bankruptcy proceedings. *Barnes v. Moore*, 2 N. B. R. 174.

235. Pending an action on a promissory note the maker filed a petition for voluntary bankruptcy and obtained a discharge, but omitted the note from his schedule of liabilities and concealed the fact of proceedings in bankruptcy from the plaintiff. *Held*, that the discharge could not be pleaded in bar of the action. *Batchelder v. Low*, 8 N. B. R. 571.

236. Where, to dissolve an attachment against him, a defendant gives an undertaking with two sureties, and more than four months after the issuance of the attachment bankruptcy proceedings are had, *held*, the discharge in bankruptcy will not prevent judgment being recovered and the sureties being bound therefor. *Holyoke v. Adams*, 10 N. B. R. 270.

237. A claimant gave bond for the deliv-

ery to him of certain property seized by the government. A decree was rendered for the government. The claimant asserted that he was discharged from liability on the bond by reason of a discharge in bankruptcy. *Held*, that the obligation was not discharged, as the federal government is not bound by a discharge. *United States v. Rob Roy and Cargo*, 13 N. B. R. 235; 1 Woods, 42; Fed. Cas. 16,179.

238. A member of a firm was discharged in bankruptcy, but in the proceedings the debts of the firm were not included, nor did the prayer for discharge cover partnership debts. *Held*, that his discharge could not be pleaded in bar to an action against him for a partnership debt. *Corey et al. v. Perry et al.*, 17 N. B. R. 147.

239. A bankrupt's discharge in a foreign country does not discharge a debt made in, and with reference to, the laws of this country. In *re Sheppard*, 1 N. B. R. 116; 7 Amer. Law Reg. (N. S.) 484; 1 Amer. Law T. Rep. Bankr. 49; Fed. Cas. 12,753.

#### (b) *Fiduciary.*

See CLAIMS, 11; COMPOSITION, 154.

240. A debt will not be discharged by the discharge in bankruptcy of one who, acting in a fiduciary character, retains money belonging to his principal. *Treadwell et al. v. Holloway et al.*, 12 N. B. R. 61.

241. The section which excepts from a bankrupt's discharge debts created by him while acting in a fiduciary character seems to apply only to a debt created by a person who was already a fiduciary when the debt was created, and not to one created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms. *Upshur v. Briscoe*, 138 U. S. 365.

242. If goods be consigned to a bankrupt to sell on commission, and he fail to account for the proceeds, this is a fiduciary debt and will not be released by a discharge. *Meador et al. v. Sharpe*, 14 N. B. R. 492.

243. A commission merchant became bankrupt, and owed a creditor for the proceeds of a sale of commission goods. *Held*, such debt cannot be released under section 33 of the act of 1867. *Lenke v. Booth*, 5 N. B. R. 351.

244. A defalcation of a guardian constitutes a debt created while acting in a fiduci-

ary capacity, and is not affected by a discharge in bankruptcy. *Halliburton v. Carter*, 10 N. B. R. 359.

#### (c) *Fraudulent.*

See COMPOSITION, 155.

245. A debt contracted by fraud is not discharged by an adjudication in bankruptcy (1867). In *re Pettis*, 2 N. B. R. 16; 7 Amer. Law Reg. (N. S.) 605; Fed. Cas. 11,046.

246. A debt created by fraud, whether reduced to judgment or not, is not to be discharged under the bankrupt act of 1867. In *re Patterson*, 1 N. B. R. 58; 2 Ben. 155; Fed. Cas. 10,817; In *re Pettis*, 2 N. B. R. 16; Fed. Cas. 11,046; In *re Robinson*, 2 N. B. R. 108; 6 Blatchf. 253; Fed. Cas. 11,939; In *re Stokes*, 2 N. B. R. 76; Fed. Cas. 13,476; In *re Wright et al.*, 2 N. B. R. 14; Fed. Cas. 18,070; *Libbey v. Strasburger*, 17 N. B. R. 468.

247. In the act defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, fraud means positive fraud or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. *Ames v. Moir*, 138 U. S. 206; *Upshur v. Briscoe*, 138 U. S. 365.

248. One purchasing goods at an agreed price to be delivered when called for, who subsequently calls for them with the knowledge that he is insolvent, and with the purpose of getting possession and shipping them out of the state without paying for them, and receiving the same with that preconceived intent, is guilty of fraud in fact involving moral turpitude or intentional wrong, and is not protected from the claim of the seller by his subsequent discharge in bankruptcy. *Ames v. Moir*, 138 U. S. 206.

249. The discharge of a bankrupt is personal to himself, and does not avail to release the right to bring an action for property fraudulently conveyed by him which is vested in his assignee alone. *Moyer v. Dewey*, 103 U. S. 301.

250. A claim against a bankrupt for damages on account of fraud or deceit practiced by him is not discharged by proceedings in bankruptcy, even where it was proved against his estate and a dividend received.

*Strang v. Bradner*, 114 U. S. 555; *Wilmot v. Mudge*, 103 U. S. 217.

251. Where a bankrupt converts property which was the subject of a conditional sale, the claim of the vendor is not barred by a discharge. *Johnson v. Worden*, 13 N. B. R. 835.

252. A vendee who obtains possession of goods under a contract to pay cash on delivery, and then ships them beyond the control of the vendor, creates a debt by fraud, which is not discharged by a discharge in bankruptcy (1867). *Classen v. Schoeneman*, 16 N. B. R. 98.

253. Fraud in procuring credit constitutes no ground for opposing the discharge of the bankrupt, but such debt may be proven, and the dividend thereon shall be payment on account of the debt, and the bankrupt continues liable thereon notwithstanding his discharge (1867). In *re Wright & Peckham*, 2 N. B. R. 14; 15 Pittsb. Leg. J. 553; Fed. Cas. 18,070.

254. If the defendant in an action for the unlawful conversion of certain goods plead a discharge, the plaintiff may reply that the claim was created by the fraud of the defendant. *Stokes & Leonard v. Mason*, 12 N. B. R. 498.

255. A debt created by fraud on which judgment has been recovered is not affected by a discharge in bankruptcy. In *re Patterson*, 1 N. B. R. 58; 2 Ben. 155; 15 Pittsb. Leg. J. 241; Fed. Cas. 10,817.

256. Where the ground of complaint is fraud in creating a debt, the rendition, with the judgment thereon, does not merge in the original indebtedness so as to free it from taint of fraud, or to permit it to be discharged in bankruptcy; but where the original debt arises in contract, and the fraud is but an incident of the debt and not its creative power, the debt will be merged in the judgment and the bankrupt discharged therefrom, where such judgment was obtained prior to the filing of the petition in bankruptcy. *Shuman v. Strauss*, 10 N. B. R. 300.

257. A recovered judgment against B. solely on the ground of fraud; afterwards B. became bankrupt; A. then sought to enforce his judgment against B. *Held*, that the judgment did not merge the fraud, and was not released by a discharge in bankruptcy. *Warner v. Cronkite*, 13 N. B. R. 52; 6 Biss. 453; 1 N. Y. Wkly. Dig. 291; 8 Chi. Leg. News, 17; Fed. Cas. 17,180.

### (d) *Judgment Not Proved.*

258. A discharge in bankruptcy will not release the lien of a judgment which was not proved. *Darsey v. Mumpford*, 17 N. B. R. 181.

259. A creditor who obtains judgment for his debt after his debtor has been adjudicated a bankrupt and takes out execution cannot prove his debt in bankruptcy, and the judgment will not be affected by the certificate of discharge. Such creditor cannot oppose the discharge. In *re Gallison et al.*, 5 N. B. R. 353; 2 Lowell, 72; Fed. Cas. 5,203.

260. A creditor who has brought his action more than four months before the commencement of proceedings in bankruptcy, and has an attachment not dissolved by such proceedings, may, after the question of the bankrupt's discharge has been determined, have a special judgment against the property attached, even if a certificate of discharge has been granted. *Ray et al. v. Wright et al.*, 14 N. B. R. 563.

261. The district court overruled a motion to have satisfaction of a judgment entered of record, because of the fact that after the rendition of the judgment the defendants had each received a discharge in bankruptcy. It appeared that the debt was not proved in bankruptcy, and that the attachment was upon exempt property, and was made less than four months prior to the bankruptcy proceedings. The decision of the district court was affirmed. *Robinson et al. v. Wilson*, 14 N. B. R. 565.

### (e) *Surety.*

See ATTACHMENT, 52; SURETY, 14, 21.

262. Neither the discharge of a bankrupt nor any step taken by a creditor in the course of the proceedings in regard to his debt can have the effect to release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise. In *re Levy*, 1 N. B. R. 66; 2 Ben. 169; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 8,297.

263. The discharge in bankruptcy does not release any person liable for the same debt with the bankrupt either as partner, joint contractor, surety or otherwise. *Abendroth v. Van Dolsen*, 181 U. S. 66.

264. A bankrupt was surety on a bond on which no cause of action arose until after he was discharged in bankruptcy. *Held*, that the discharge did not release him from liability. *Eastman v. Hibbard*, 13 N. B. R. 360.

265. The certificate of discharge given a bankrupt does not include liability as surety for the faithful performance of duty by a public officer. *United States v. Herron*, 9 N. B. R. 535; 20 Wall. 251.

266. The discharge of a bankrupt does not affect the creditor's remedy against the sureties upon a bond given to dissolve a writ of garnishment issued more than four months before commencement of proceedings in bankruptcy. *In re Albrecht*, 17 N. B. R. 287; Fed. Cas. 145.

267. An action upon an undertaking, on which the defendants were sureties, was pending upon appeal from a judgment in favor of the plaintiffs. The judgment debtor was discharged in bankruptcy before the affirmance of the judgment, and the defendants set up the discharge as a defense. *Held*, it was no defense. *Knapp et al. v. Anderson et al.*, 15 N. B. R. 316.

## XV. DEBTS RELEASED BY.

See COMPOSITION, 151-153.

### (a) *In General.*

268. A bankrupt must, in a given proceeding, be discharged from all his debts or none. *In re Plumb*, 17 N. B. R. 76; 9 Ben. 279; Fed. Cas. 11,231.

269. A fine inflicted for the violation of an injunction is not a debt, within the meaning of the law, so that a discharge granted under the law operated to exonerate the bankrupt from imprisonment for the fine. *Spalding v. New York*, 4 How. 21.

270. Where a principal is released from a debt by his discharge in bankruptcy, he will also be released from his contingent liability to his surety for the same debt. *Halliburton v. Carter*, 10 N. B. R. 359.

271. In an action on a bond given on the arrest of a debtor, and conditioned that he will apply for the benefit of the state insolvent laws, a plea of a subsequent discharge in bankruptcy is valid, unless the debt is one from which a discharge will not release him. *Hubert v. Horter*, 14 N. B. R. 430.

272. A bankrupt who purchases the business of another under a covenant to pay his debts and hold him harmless is released by a discharge in bankruptcy, although he falsely represents to the vendor that the debts are paid. *Brown et al. v. Broach et al.*, 16 N. B. R. 296.

273. A judgment recovered in an action in assumpsit pending proceedings in bankruptcy is discharged by a discharge in bankruptcy. *In re Stansfield*, 16 N. B. R. 268; 4 Sawy. 334; Fed. Cas. 13,294.

274. A judgment obtained on a breach of a promise to marry is barred by the discharge of the bankrupt. *In re Sidle*, 2 N. B. R. 77; Fed. Cas. 12,844.

275. A judgment was recovered for damages for the seduction of a daughter, there being no promise of marriage and no acts or devices practiced which would amount to legal fraud on the father. *Held*, not a debt created by fraud. *Howland v. Carson*, 16 N. B. R. 372.

276. Although a claimant subsequently endeavored to sustain his case by false testimony, a debt on a bond filed by him to obtain the delivery of property is not a debt created by fraud. *United States v. Rob Roy and Cargo*, 13 N. B. R. 235; 1 Woods, 42; Fed. Cas. 16,179.

277. Where a bankrupt, prior to bankruptcy, sells land under a covenant for indefeasible title, when in fact the wife of a former owner has a dower interest not relinquished, the claim for breach of covenant in the event of the wife surviving her husband and asserting her rights is not such an "unliquidated" or "contingent" claim as may be proved in bankruptcy, and in an action on such claim a discharge in bankruptcy is a complete defense. *Riggin v. Magwire*, 8 N. B. R. 484; 15 Wall. 549.

278. A gave his note for land. He was declared a bankrupt and the land was duly assigned as his homestead. On a suit on the note, *held* the discharge was a good defense. *Hoskins v. Wall*, 17 N. B. R. 314.

279. If the holder of a note assent to the discharge of the maker, without the consent of the indorser, this releases the indorser. *In re McDonald*, 14 N. B. R. 477; 24 Pittsb. Leg. J. 42; Fed. Cas. 8,753.

280. The obligation of a drawee, upon a bill of exchange accepted and dishonored by

him, to an indorser who pays the same, will be barred by a discharge in bankruptcy of the drawee, where the proceedings are begun after the dishonor, but before the payment. *Hunt v. Taylor*, 4 N. B. R. 683 (8 vo. ed.).

(b) *Provable.*

See CLAIMS, 115.

281. All debts which by their nature are provable are discharged, whether they in fact could be proved or not. In re Kingsley, 1 N. B. R. 86; 1 Lowell, 216; 7 Amer. Law Reg. (N. S.) 423; 15 Pittsb. Leg. J. 235, 277; Fed. Cas. 7,819.

282. Section 34 of the bankrupt act of 1867 declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon. *Dusenbury v. Hoyt*, 10 N. B. R. 813.

283. A discharge in bankruptcy is a complete bar to a suit on a claim provable under the bankrupt law, but its dismissal does not prejudice proceedings on it under the law. *Humble v. Carson*, 6 N. B. R. 84.

284. A suit was brought for a month's rent, part of which accrued before bankruptcy and part afterwards. *Held*, that for the part accruing before bankruptcy the plaintiffs could prove against the estate and that the discharge will release it. For that part accruing afterward they could recover, as the discharge does not release it. *Treadwell et al. v. Marden*, 18 N. B. R. 353.

285. A defendant sold the plaintiff certain land, gave a warranty deed, and agreed in writing to pay a certain mortgage on the land. The defendant was discharged in bankruptcy, after which the land was sold under the mortgage. On a suit on the warranty, *held*, that the plaintiff's debt was one provable in bankruptcy and from which the defendant was discharged. *Parker v. Bradford*, 17 N. B. R. 485.

286. A plaintiff sued for breach of covenant of warranty of title. The defendant pleaded, in bar, a discharge in bankruptcy. *Held*, that a claim for breach of warranty should be proved in a bankrupt court and therefore the defendant's discharge was a bar, the claim having accrued prior to proceedings in bankruptcy. *Williams v. Har-kins*, 15 N. B. R. 84.

287. A claim for damages for wrongful conversion of personal property is provable under the nineteenth section of the bankrupt act of 1867, and a discharge in bankruptcy will release the bankrupt from such a claim; his plea of bankruptcy interposed in a suit brought in a state court to recover such damages is a complete bar, and entitles him to a dismissal of the cause. *Coles v. Roach*, 10 N. B. R. 288.

288. Section 19 of the bankrupt act of 1867 authorizes sureties, indorsers and persons liable for the bankrupt to prove the debt for which they are liable when not proven by the creditor, or without first paying it, and such debts being provable are released by the discharge. In re Perkins et al., 10 N. B. R. 529; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 135; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 43; Fed. Cas. 10,983.

(c) *Not Fiduciary.*

289. A debt due from a factor for the proceeds of goods is barred by his discharge in bankruptcy. *Woolsey v. Cade*, 15 N. B. R. 238.

290. A produce dealer as an accommodation collected moneys for parties at their request, and without fraudulent intent deposited the proceeds to his own credit with his own funds, and, before he paid it over, by an unexpected reverse was forced into bankruptcy; the debt is not one created by fraud or by defalcation while acting in a fiduciary capacity so as to exempt it from his discharge. *Noble v. Hammond*, 129 U. S. 65.

291. An attorney's failure to pay over moneys under an agreement to faithfully carry into effect an instrument appointing him as attorney to receive moneys for the benefit of another and to pay the interest annually to such other during life, and at his death to pay the principal sum to his legal issue, or, if she dies without legal issue, said sum to revert to the maker of the instrument, does not create a fiduciary debt, exempting such debt from a discharge, although the obligation is called a trust in the instrument and accompanying papers. *Upshur v. Briscoe*, 138 U. S. 365.

292. The liability of a husband to his wife for her paraphernal property, under the law

of Louisiana, was provable by her against him as a debt under the bankruptcy act. It is not his fiduciary debt within the meaning of that act, and consequently it was barred by his discharge. *Fleitas v. Richardson*, 147 U. S. 550.

293. A discharge operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed. *Hennequin v. Clews*, 111 U. S. 676.

294. An agent who sells goods for his principal on commission, accounting for and paying over the balance of sales monthly, is released from liability for an unpaid balance by a discharge in bankruptcy, such debt not having been created in a "fiduciary character," and if such debtor be arrested under a state statute he will be released on application to the district court. *Grover & Baker v. Clinton*, 8 N. B. R. 312; 5 *Bia*. 324; 6 *Chi. Leg. News*, 33; 21 *Pittsb. Leg. J.* 34; *Fed. Cas.* 5,845.

295. Goods were sold by a factor for parties who afterwards became bankrupt and were discharged. The plaintiff's claim was allowed and his *pro rata* share tendered him but not accepted, and he sued for the amount of his claim. *Held*, that the discharge was a bar, and that the debt was not contracted in such a fiduciary capacity as to except it from the operation of the bankrupt law. *Owsley et al. v. Cobin et al.*, 15 N. B. R. 489; 2 *Hughes*, 433; 4 *N. Y. Wkly. Dig.* 431; 9 *Chi. Leg. News*, 323; 4 *Law & Eq. Rep.* 49; 23 *Int. Rev. Rec.* 210; *Fed. Cas.* 10,636.

#### (d) *Despite Omission from Schedule.*

296. The debt of a creditor is barred by a discharge under the act of 1869, where his name was inadvertently omitted from the schedule, with no fraudulent intention, and he therefore receives no notice of the bankruptcy proceedings. *Lamb, Ass., v. Brown*, 12 N. B. R. 522; 7 *Chi. Leg. News*, 363; 1 *N. Y. Wkly. Dig.* 176; *Fed. Cas.* 8,011.

297. An action in *assumpsit* being brought, the defendant pleaded his discharge in bankruptcy, to which was filed a replication stat-

ing that the claim was omitted from the schedule, and that the plaintiff had no notice of the proceedings. *Held*, that the discharge was from all debts except those specifically excepted by the bankruptcy act of 1867. *Id.*

298. A discharge will bar a claim, although the residence of the creditor was incorrectly given in the schedule, and no notice was served on him and he had no knowledge of the proceedings, provided the notice prescribed by section 29 of the act of 1867 be given. *Pattison & Co. v. Wilbur*, 12 N. B. R. 193.

299. A creditor of a bankrupt brought an action on his claim which was provable. Notice had been given, by publication, of bankruptcy proceedings, but no personal service was had on the plaintiff. The defendant pleaded a discharge. The plaintiff's name was not in the schedule of creditors. *Held*, that in the absence of fraud in the omission the discharge was a bar. *Heard v. Arnold et al.*, 15 N. B. R. 543.

#### (e) *Surety on Bond.*

300. A discharge in bankruptcy releases a surety on a guardian's bond from liability for defaults of the guardian which occurred prior to the commencement of proceedings against the surety. *Jones & Cullom v. Knox*, 8 N. B. R. 559; *Reitz v. The People*, 16 N. B. R. 96; *Ex parte Taylor*, 16 N. B. R. 40; 24 *Pittsb. Leg. J.* 205; 1 *Hughes*, 617; *Fed. Cas.* 13,773.

301. In an action against a surety on the bond of a deceased United States internal revenue collector, the defendant pleaded a discharge in bankruptcy. *Held*, a good defense. *United States v. Throckmorton*, 8 N. B. R. 309; 18 *Int. Rev. Rec.* 54; *Fed. Cas.* 16,516.

302. Where one enters an appeal and is afterwards adjudged a bankrupt, and is fully discharged as such in the proper court, the discharge of the principal discharges the surety on the appeal who contracted to become liable for the payment of the judgment. *Odell v. Wooten*, 4 N. B. R. 46.

#### (f) *Of Partnership.*

303. Where a discharge in bankruptcy is granted a member of a firm, it is a release of joint as well as of separate debts. *Wilkins v. Davis*, 15 N. B. R. 60; 2 *Lowell*, 511; *Fed. Cas.* 17,664.

**304.** A discharge founded upon the individual petition of a firm, the other members of which had died insolvent, would probably operate as a discharge of the petitioner from his debts as a member of the firm as well as individually, but it is safer to amend the petition. *In re Bidwell*, 2 N. B. R. 78; Fed. Cas. 1,392.

**305.** Of the firm A, B. & C., A. and B. sold their interests to D. and E., who, with C., formed a new firm, which promised to pay the debts of the firm A, B. & C. One debt of the old firm remained unpaid, and C., in its name, executed a note in favor of C., D. and E., which was indorsed by them to the debtor. The note was renewed and the debt remained unpaid (A. and B. being deceived as to that), when C., D. and E. were declared bankrupts and received their discharge. A. and B. paid the debt, and in an action against C., D. and E., *held*, that their discharge was a bar to the action. *Brown et al. v. Broach et al.*, 16 N. B. R. 296.

## XVI. EFFECT OF.

See APPEALS, ETC., 29; ARREST, 21, 24, 25.

**306.** Where there is no defect in the proceedings for a composition, the admission of a discharge does not prejudice the opposite party. *Smith, Stebbins & Co. v. Engle et al.*, 14 N. B. R. 481.

**307.** The discharge of a bankrupt relates back to the date of the deed of assignment. *Reiley v. Lamar*, 2 Cranch, 344.

**308.** The certificate of discharge in bankruptcy is conclusive evidence of the fact and regularity of such discharge. *Palmer v. Hussey*, 119 U. S. 96.

**309.** The discharge does not prevent an attaching creditor from taking judgment against the debtor in such limited form as may enable him to reap the benefits of his attachment. *Hill v. Harding*, 130 U. S. 699.

**310.** Where, by the Louisiana law, the debt of a husband to his wife was of such nature that it became extinguished by his discharge in bankruptcy, her mortgage, which was but a security for that debt, disappeared with it and cannot attach to the lands purchased by him after his discharge, and his creditors under a subsequent mortgage from him to them are entitled to set up his

discharge against any lien claimed by her upon the lands. *Fleitas v. Richardson*, 147 U. S. 550.

**311.** A discharge in bankruptcy does not operate on continuing contracts so as to permit the bankrupt to enjoy the benefits arising therefrom after the filing of his petition and at the same time exempt him from liability for such enjoyment. *Robinson v. Peasant*, 8 N. B. R. 426.

**312.** Application for exemption can be made only before the bankrupt's discharge; a discharged bankrupt cannot be re-admitted to petition for and to be allowed an additional exemption granted after his discharge. *In re Kean et al.*, 8 N. B. R. 367; 3 Hughes, 322; 2 Amer. Law Rec. 230; Fed. Cas. 7,630.

**313.** A bankrupt under arrest upon a judgment in trespass having received his discharge in bankruptcy will be discharged from custody. *In re Simpson*, 2 N. B. R. 17; Fed. Cas. 12,879.

**314.** An injunction restraining creditors from suing pending the adjudication is dissolved by the debtor's discharge in bankruptcy. *In re Thomas*, 3 N. B. R. 7; Fed. Cas. 13,690.

**315.** Where a bankrupt has failed to put property in his schedule, the right of the assignee to recover it is not barred by a discharge granted before discovery. *Maybin v. Raymond, Ass.*, 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,338.

**316.** A discharge in bankruptcy is not a sufficient defense in an action to set aside a fraudulent conveyance pending at the time of filing the petition, the assignee not having interfered in the cause and the claim of the creditor not having been proved in the proceedings in bankruptcy. *Phelps et al. v. Curts et al.*, 16 N. B. R. 85.

**317.** The assignee in bankruptcy has no right to examine the bankrupt under the provisions of section 26 of the bankrupt act of 1867 after his discharge from his debts and liabilities provable under said act. *In re Witkowski*, 10 N. B. R. 209; Fed. Cas. 17,920.

**318.** A bankrupt's certificate of discharge, pleaded in an action in the supreme court of Maine, will not, by virtue of Revised Statutes, chapter 81, section 33, dissolve an attachment made by virtue of the writ in the action, more than four months prior to the defend-



ant's commencement of proceedings in bankruptcy. The attachment thus made may be enforced by an execution issued upon a special judgment rendered by the court in which the action was entered and prosecuted. The district court of the United States does not have exclusive jurisdiction in such matters. *Deighton v. Kelsey et al.*, 4 N. B. R. 155.

319. A bankrupt's certificate discharges his person and his future acquisitions, but out of the property subject to lien, a lien creditor is entitled to satisfaction. In re *Campbell*, 1 N. B. R. 166 (8 vo. ed.).

## XVII. COLLATERAL ATTACK ON.

See COLLATERAL ATTACK, 8.

320. A discharge in bankruptcy is conclusive in the absence of fraud, and cannot be impeached collaterally by a creditor to whom no notice of the proceedings had been given. *Williams v. Butcher*, 12 N. B. R. 148.

321. Defendants pleaded a discharge in bar of an action. The plaintiff replied that the discharge was fraudulently obtained. *Held*, that a discharge duly granted, when pleaded in bar to an action in a state court, cannot be impeached on the ground of fraud. *Smith v. Ramsey*, 15 N. B. R. 447.

322. In an action on a promissory note in a state court the defendant pleaded a discharge in bankruptcy, and the plaintiff alleged that his name was fraudulently omitted from the schedules, and that he had no notice of the proceedings. *Held*, the discharge could not be impeached in the state court. *Black v. Blazo*, 13 N. B. R. 195.

323. A plaintiff brought action to collect a judgment against a discharged bankrupt, alleging that he had no notice of proceedings in bankruptcy, that such notice was fraudulently withheld from him, and that after the commencement of his action the bankrupt removed his property from the jurisdiction of the court with intent to defraud creditors. *Held*, that the discharge could not be impeached in a collateral action. *Howland v. Carson*, 16 N. B. R. 372.

## XVIII. PLEADING A DISCHARGE.

See ATTACHMENT, 19, 48; CONTRACTS, 27, 20.

### (a) *In General.*

324. If, upon a suggestion of the defendant's bankruptcy, before judgment, a motion

be made for a continuance, a discharge may be pleaded on the allowance of a writ of review. *Todd et al. v. Barton et al.*, 13 N. B. R. 197.

325. A plea of a discharge which does not set forth a copy thereof is bad. A plea is bad at common law unless it aver what court adjudged the defendant a bankrupt, or granted him his discharge, or set out the facts upon which any court would acquire jurisdiction so to do. Such plea should conclude with a verification. If defective, it may be amended. *Stoll v. Wilson*, 14 N. B. R. 571.

326. In an action to set aside a fraudulent conveyance of real estate and subject the same to the payment of a creditor's judgment, a discharge in bankruptcy may be set up in bar of a personal decree against the debtor, further than the subjection of the property and claims covered and reached by complainant's bill, to the satisfaction of his judgment. *Phelps et al. v. Curtis et al.*, 16 N. B. R. 85.

327. The question whether a discharge affects a debt can only arise and be determined between the parties in a suit prosecuted to collect the debt, in which the discharge shall have been pleaded as a bar to recover. In re *Wright*, 2 N. B. R. 142 (8 vo. ed.); 2 Ben. 509; Fed. Cas. 18,065.

### (b) *Failure to Plead.*

328. A discharge in bankruptcy does not *per se* operate as a discharge of all a bankrupt's debts. A court will not take judicial knowledge of a discharge, and if not pleaded, a valid judgment may be rendered against a bankrupt. *Jenks v. Opp*, 12 N. B. R. 19.

329. A widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense, and is not deprived of the benefit of it by the failure of his heirs to plead it. *Upshur v. Briscoe*, 138 U. S. 365.

330. A bankrupt failed to plead his discharge in bar to an action and allowed judgment to be recovered against him. In an action on the judgment, *held*, that the discharge was no defense. *The Revere Copper Co. v. Dimock*, 19 N. B. R. 372.

331. A bankrupt who permits a judgment to be recovered against him, by neglecting

to insist upon his discharge, waives the benefits thereof and renders any property he may have liable for the judgment. *Dewey et al. v. Moyer et al.*, 16 N. B. R. 1.

332. If a bankrupt's counsel fail to appear for him in an action because he supposed that the counsel for a co-defendant also represented the bankrupt, a review of a judgment by default will be granted, so that a discharge may be pleaded. *Shurtleff v. Thompson*, 12 N. B. R. 524.

333. A surrender in bankruptcy does not operate as a payment, and a judgment against a bankrupt who does not plead his discharge in bar of the action is valid. *Ludeling v. Felton et al.*, 17 N. B. R. 310.

334. A bankrupt court has no power to grant relief against a judgment recovered against a bankrupt in an action on a debt contracted before the adjudication, in which, for any cause, his discharge has not been pleaded. If the court had power it would not interfere to save him from the results of the laches of his counsel and himself. *In re Ferguson*, 16 N. B. R. 530; 2 *Hughes*, 286; *Fed. Cas.* 4738.

335. An action was commenced in January, 1867, the defendant answering in February following. In May, 1868, the defendant obtained a discharge, and in the summer of 1869 he applied to the plaintiff's attorney to file a supplemental answer setting up the discharge. In November, 1869, he served papers for a motion for leave to set up the supplemental answer. *Held*, that his right to plead his discharge was lost by delay. *Medbury v. Swan*, 8 N. B. R. 537.

336. A supplemental answer may be interposed, setting up a discharge in bankruptcy, when it does not appear that the plaintiffs disclosed their lien in proving their debt. *Stewart v. Isidor*, 1 N. B. R. 129.

### (c) *When Not Pleadable.*

337. A discharge obtained pending an appeal cannot be pleaded in an appellate court. Such court takes cognizance only of the matters appearing on the record of the court below. *Serra e Hijo v. Hoffman & Co.*, 17 N. B. R. 124.

338. The assignee cannot plead a discharge in bankruptcy in bar in an action against the bankrupt. *Id.*

339. The wife of a bankrupt cannot plead his discharge in bankruptcy in bar of an action against her for her half of community debts where she has accepted the community. *Ludeling v. Felton et al.*, 17 N. B. R. 310.

340. A bankrupt will not be allowed to file a supplemental answer setting up his discharge where an attachment issued more than four months prior to the institution of bankruptcy proceedings was dissolved by filing a bond. *Holyoke et al. v. Adams et al.*, 13 N. B. R. 413.

### XIX. REVIVAL OF DEBT AFTER.

341. A new promise to pay a debt after a discharge in bankruptcy revives the debt. *Classen v. Schoeneman*, 16 N. B. R. 98.

342. An appellee sued on a promissory note; the appellant pleaded a discharge as a bankrupt; the appellee set up a new promise. *Held*, that the new promise must be clear, distinct, express and unequivocal; and if it be so it will revive the liability. *St. John v. Stephenson*, 19 N. B. R. 227.

343. One bankrupt sued another bankrupt on a promissory note. The defendant pleaded his discharge. The plaintiff alleged a new promise since the discharge. *Held*, that such promise need not be in writing under the laws of North Carolina. *Henley v. Lanier*, 15 N. B. R. 280, 281.

344. A bankrupt was discharged, but subsequently confessed judgments to creditors for debts owing by him prior to the discharge. *Held*, that the old debts were sufficient considerations for the judgments, but that the judgments did not revive the old debts but created new ones. *Dewey v. Moyer*, 18 N. B. R. 114.

345. Though a bankrupt is morally obligated to pay a discharged debt, he is legally discharged. This moral obligation to pay, united with a subsequent promise of the bankrupt to pay the debt, gives a right of action. *Dusenbury v. Hoyt*, 10 N. B. R. 313.

346. A new promise to pay a debt due by a bankrupt in consideration that the payee will withdraw objections to the discharge is illegal and void, and no action can be sustained thereon. *Austin v. Markham*, 10 N. B. R. 548.

347. A bankrupt promised, after bankruptcy but before his discharge, to pay a

note made before bankruptcy. In a suit on the note, *held*, that he could not be made to pay. *Ogden et al. v. Redd*, 18 N. B. R. 817.

## DISCONTINUANCE.

See PLEADING AND PRACTICE, VI.

## DISQUALIFICATION.

See JUDGE, 1.

## DISTRESS.

See RENT, 22.

## DISTRIBUTION.

See DIVIDENDS.

## DIVIDENDS.

### I. WHAT CONSTITUTES.

### II. WHO MAY RECEIVE.

#### (a) *In General.*

#### (b) *In Partnership Cases.*

### III. EXCESS OF ASSETS.

### IV. SET-OFF.

### V. COMPOSITION.

### VI. POWER OF CREDITORS.

### VII. UNDER GENERAL ASSIGNMENT.

### VIII. IN GENERAL.

See CLAIMS, 87; COMMERCIAL PAPER, 68; COSTS AND FEES, 58; DISCHARGE, 145; PREFERENCES, 200; PROOF OF CLAIMS, 48; TRUSTEE, 22.

### I. WHAT CONSTITUTES.

1. Appeal having been taken from order allowing creditor interest upon unpaid dividend, creditor procured order directing trustee to deposit dividend, interest and costs. *Held*, that such deposit was not such a setting aside of money as constituted creditor's dividend. In *re Kitzinger et al.*, 19 N. B. R. 307; Fed. Cas. 7,863.

## II. WHO MAY RECEIVE.

### (a) *In General.*

2. Upon making proof, all who had valid subsisting claims at the time the bankruptcy proceedings commenced shall be permitted to participate in the fund so long as there is anything to distribute. In *re Maybin*, 15 N. B. R. 468; Fed. Cas. 9,387.

3. The holder of a promissory note may prove his claim against the estate of both the maker and the indorser and receive dividends to the full amount of his debt. *The Nat. Mount Wollaston Bank v. Porter et al.*, 17 N. B. R. 329.

4. A judgment rendered after adjudication in bankruptcy, although the debt upon which it was founded existed and suit thereon was instituted prior thereto, is not provable against the estate of a bankrupt, and no dividend can be declared thereon. In *re Williams*, 2 N. B. R. 79; 3 Amer. Law Rev. 374; 1 Amer. Law T. Rep. Bankr. 107, 113; Fed. Cas. 17,705.

5. When a deed is void as to existing creditors, and is therefore set aside, all creditors prior and subsequent shall join in the fund *pro rata*. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071; *Kehr et al. v. Smith, Ass.*, 10 N. B. R. 49; 20 Wall. 31.

7. A debt was proved against the estate of the bankrupts, on a note made by them and indorsed, and after proof was made the indorsers paid a portion of the amount due and were released by the holder from further liability. *Held*, that the creditor should receive dividends on the whole amount, holding any excess of dividends in trust for the surety. In *re Ellerhorst & Co.*, 5 N. B. R. 144; 6 Amer. Law Rev. 162; Fed. Cas. 4,381.

8. On objections by assignee to a foreign creditor making proof and claiming dividend on the debt, without regard to the amount collected by a judgment and levy had against the bankrupt subsequent to the adjudication, *held*, that after accounting to assignee for such amount, dividend could only be had on the original debt. In *re Bugbee*, 9 N. B. R. 258; Fed. Cas. 2,115.

9. If a creditor of a bankrupt include in his claim items which are valid and also items which he knows to be illegal, support-

ing his claim for the entire amount by a false oath, he is not entitled to any dividends whatever on any part of his claim. *Marrett, Ass., v. Atterbury*, 11 N. B. R. 225; 8 Dill. 444; 2 Cent. Law J. 11; Fed. Cas. 9,103.

10. A firm of attorneys filed a petition with a register, setting up that prior to the assignment they had performed certain services for the bankrupt, for which services they held a note past due, and prayed that the assignee be directed to pay them out of the funds for dividend. They had not presented the claim either on or prior to the day appointed for the declaration of the dividend, and the court held that the fund could not be re-opened to pay such claim. *In re Smith*, 15 N. B. R. 97; 1 Tex. Law J. 42; Fed. Cas. 12,989.

11. A creditor holding security is only entitled to a dividend upon the balance of his claim after deducting the proceeds of securities in his hands. *In re Jaycox v. Green*, 7 N. B. R. 808; Fed. Cas. 7,240. *Contra*, *Jervis v. Smith*, 8 N. B. R. 147.

### (b) *In Partnership Cases.*

See PARTNERS, 96.

12. Where there are both joint and separate debts, proved in a bankruptcy or on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets until the separate creditors are paid in full. *In re Byrne*, 1 N. B. R. 122; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; 15 Pittsb. Leg. J. 315; Fed. Cas. 2,270.

13. Firm creditors cannot share in the individual, where there are firm assets, until the individual creditors are paid in full. *In re Smith et al.*, 13 N. B. R. 500; Fed. Cas. 12,987.

14. One party sold his interest to the other, taking his notes therefor. The purchaser became bankrupt, leaving some of the notes unpaid. It was held that the selling partner could receive no dividend from the assignee until all the partnership debts had been paid. *In re Jewett*, 1 N. B. R. 131; 7 Amer. Law Reg. (N. S.) 294; 2 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 7,309.

15. Where there are both individual and

partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the goods in the purchase of which the partnership debts had originated, the partnership creditors will be entitled to be paid *pari passu* with the individual creditors. *In re Jewett*, 1 N. B. R. 180; 7 Amer. Law Reg. (N. S.) 291; Fed. Cas. 7,304.

16. When all the assets of a bankrupt firm are expended in the payment of costs and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner. *In re MoEwen & Sons*, 12 N. B. R. 11; 6 Biss. 294; 7 Chi. Leg. News, 231; 2 Cent. Law J. 233; Fed. Cas. 8,783.

17. If a creditor having a firm note indorsed by one partner, and holding property of such partner as security, obtains payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note. *In re Foot et al.*, 12 N. B. R. 837; 8 Ben. 228; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 4,906.

18. The holder of a note given by a firm and also by an individual member of the firm is entitled to receive dividends from the estates of both. *Emery et al. v. Canal Nat. Bank*, 7 N. B. R. 217; 3 Cliff. 507; 6 West. Jur. 515; 5 Amer. Law T. Rep. (U. S. Cts.) 419; Fed. Cas. 4,446.

### III. EXCESS OF ASSETS.

19. The amount in the hands of the assignee for distribution exceeded the amount of the debts proved. *Held*, that such excess should be applied to reducing the interest accruing from date of computation. *In re Town et al.*, 8 N. B. R. 40; Fed. Cas. 14,112.

20. When but a single creditor proves his claim, he is entitled to be paid in full as far as the assets are sufficient for that purpose, and if there be any residue the same must be applied to the payment of such creditors

as the bankrupt has acknowledged to hold valid claims. In *re Haynes*, 3 N. B. R. 78; 1 *Gaz.* 78; *Fed. Cas.* 6,269.

21. Any money remaining in the hands of the assignee, after the payment in full of creditors who have proven their claims, must be distributed among such creditors as are named in the bankrupt's list, although they have failed to make proof of their claims. In *re James*, 2 N. B. R. 78; 1 *Gaz.* 78; *Fed. Cas.* 7,175.

22. If a surplus remain as regards a bankrupt bank, after the payment of all claims at the amount computed to be due on the date of adjudication, creditors holding its bills may be allowed interest from the date of adjudication to the time of payment of dividends. In *re Bank of N. C.*, 12 N. B. R. 130; 1 N. Y. *Wkly. Dig.* 127; *Fed. Cas.* 895.

#### IV. SET-OFF.

23. A debtor gave a creditor his accommodation notes for an amount greater than the debt, and the notes were discounted and afterwards proved against the debtor's estate in bankruptcy. *Held*, that an assignee could set off against the dividend due the creditor the dividend paid on the notes, and recover from the creditor the balance of the dividend paid, and that in case of a composition the same right obtains. In *re Purcell*, 18 N. B. R. 447; *Fed. Cas.* 11,470.

24. Where creditors of an insolvent corporation are also stockholders they will not be permitted to deduct the amount of their claims from their proportions of the unpaid capital; yet, if their debts are proved in bankruptcy, deductions may be made, perhaps, from the assignee's demands equal to their estimated dividends. *Wilbur, Ass. v. Stockholders*, 18 N. B. R. 178; 13 *Phila.* 479; 35 *Leg. Int.* 346; 26 *Pittsb. Leg. J.* 15; *Fed. Cas.* 17,636.

25. Plaintiff, with knowledge of all the facts, received and accepted his dividend out of a bankrupt's estate. The bankrupt had recovered a verdict against plaintiff and proposed to levy the judgment in full. *Held*, that a court of equity would not enforce a set-off of the balance of his claim against the judgment obtained by the bankrupt. *Hunt v. Holmes*, 16 N. B. R. 101; *Fed. Cas.* 6,890.

#### V. COMPOSITION.

See COMPOSITION, 54.

26. If an offer of composition is accepted, the payment is for the satisfaction of the debts, and not as a dividend from the estate in bankruptcy. In *re Lissberger*, 18 N. B. R. 230; *Fed. Cas.* 8,384.

27. Where the record shows on its face, by the debtor's own statement, that his estate is able to pay a much larger dividend than that offered in composition, the dissenting creditors may rely upon this statement and are not bound to prove the facts by affidavits. In *re Weber Furniture Co.*, 13 N. B. R. 529; *Fed. Cas.* 17,330.

#### VI. POWER OF CREDITORS.

28. A second meeting of creditors may dispose of the funds for the allowance of claims by paying as far as possible those already proved, and it is not necessary to retain a like percentage for those which might thereafter be proved, even if such action puts it out of the power of the assignee to make a similar dividend upon such unproved claims in the event that they would be proved before a third meeting of creditors. In *re Mills*, 11 N. B. R. 117; 7 *Ben.* 452; *Fed. Cas.* 9,610.

29. The assignee is in all respects the agent, attorney and representative of the general creditors by statutory appointment. The general creditors have no power to act except to vote on the selection of an assignee and on the subject of dividends. In *re Campbell*, 17 N. B. R. 4; 3 *Hughes*, 276; *Fed. Cas.* 2,348.

#### VII. UNDER GENERAL ASSIGNMENT.

30. Where creditor has accepted a dividend under an assignment, he has the right to disaffirm the act, on discovering the assignment to be fraudulent, by tendering back what he has received. *Johnson, Ass. v. Rogers et al.*, 15 N. B. R. 1; 5 *Amer. Law Rec.* 536; 14 *Alb. Law J.* 427; *Fed. Cas.* 7,408.

#### VIII. IN GENERAL.

31. A bankrupt having appropriated money left with him as a special deposit, the depositor filed a petition to have the debt

paid in full out of the general assets. *Held*, depositor could only share *pro rata* with other creditors. In re King, 9 N. B. R. 140.

32. Creditors of bankrupt declared a dividend; one of the creditors was also a debtor of one of the members of the firm, which debt appeared on the individual schedule. Assignee brought suit in state courts to recover from the creditor the amount due the estate, which action was pending. On refusal of assignee to pay creditor the amount of dividend, a motion was made to compel payment. *Held*, that the assignee could withhold payment of the dividend to creditor, declared upon the net proceeds of the joint stock, until final determination of the suit. Atkinson v. Kellogg, 10 N. B. R. 535; 7 Chi. Leg. News, 9; Fed. Cas. 618.

33. A bankrupt could not, by mere protest made to assignee, alleging want of jurisdiction in the court, in a case commenced after December 1, 1873, and prior to the approval of the amendments of the bankrupt law, stop the declaring of a dividend which could be legally declared under the law prior to the amendments. In re Rosenthal, 10 N. B. R. 191; 1 Cent. Law J. 364; 6 Chi. Leg. News, 842; 81 Leg. Int. 254; Fed. Cas. 12,062.

34. Proving a debt and recovering dividends in bankruptcy against a corporation is no bar to recovering judgment for the balance in a state court. The Ansonia B. and C. Co. v. The New L. C. Co., 10 N. B. R. 355.

35. Upon the bankruptcy of a debtor, a special receiver under an assignment valid under the state law held funds which came into his hands by virtue thereof. *Held*, that a proper amount should be distributed by the receiver among the creditors, the basis of each distribution being determined by reference to a master. Sedgwick v. Place et al., 8 N. B. R. 78; Fed. Cas. 12,623.

36. When a judgment on which a *superseas* and stay has been granted by the state court, pending the decision of a writ of error, is proved in bankruptcy, the bankrupt court will stay the payment of dividends likewise. Avery v. Johann, 8 N. B. R. 36; Fed. Cas. 675, dissented from In re Sheehan, 8 N. B. R. 845; Fed. Cas. 12,737.

#### DOMICILE.

See PLACE OF BUSINESS.

#### DOWER.

- I. IN MORTGAGED PROPERTY.
- II. IN REAL ESTATE GENERALLY.
- III. CONTRACTS AFFECTING.

See CONVEYANCES, 25; INTEREST, 8; PREFERENCES, 8; SALE, 68.

#### I. IN MORTGAGED PROPERTY.

1. Where a wife joins her husband in a mortgage of real estate, her inchoate right of dower exists only in the equity of redemption. Hiscock, Ass. etc., v. Jaycox & Green, 12 N. B. R. 507; Fed. Cas. 6,581.

2. A wife's dower, where she joins in a mortgage of her husband's property, can be barred only by sale of the property under a power of sale contained in the mortgage, or by a decree of a court where she can be made a party to proceedings, a sale in bankruptcy proceedings being ineffectual. In re Bartenbach, 11 N. B. R. 61; 2 Amer. Law T. Rep. (N. S.) 33; Fed. Cas. 1,068.

#### II. IN REAL ESTATE GENERALLY.

3. A *feme covert* is not entitled to dower in real estate held as partnership assets. Hiscock, Ass. etc., v. Jaycox & Green, 12 N. B. R. 507; Fed. Cas. 6,581.

4. Wife of bankrupt petitioned that her *thirds* in lands sold by assignee might be laid off to her under provisions of "An act restoring to married women their common-law rights of dower." Petition denied. In re Kelley v. Strange, 8 N. B. R. 2; Fed. Cas. 7,676.

5. A wife is not entitled to dower in the lands of her living husband, in any case in which debts are due from the bankrupt which were contracted previous to the passage of the act. In re Hester, 5 N. B. R. 285; Fed. Cas. 6,437.

6. Under law of Indiana, widow is entitled to one-third of all real estate of which her husband was seized during coverture, in which she may not have joined in conveyance with him, and also one-third of all real estate in which husband had equitable interest at time of his death. Warford, Ass., v. Noble et al., 19 N. B. R. 440.

7. A debtor filed his petition after passage of act by legislature restoring common-law

right of dower, and died after issuance of the warrant in bankruptcy. *Held*, that the wife is entitled to dower in lands owned by the bankrupt at date of filing petition, but that she is not entitled to exempted personal property. In *re Hester*, 5 N. B. R. 285; Fed. Cas. 6,437.

8. The dower right of wife of bankrupt is not divested by proceedings under bankrupt act. In *re Angier*, 4 N. B. R. 199; Fed. Cas. 888.

### III. CONTRACTS AFFECTING.

9. A fraudulent conveyance does not forfeit the dower right of a wife or the homestead exemption of the husband, as against the assignee in bankruptcy, when said conveyance has been set aside. *Cox v. Wilder et al.*, 7 N. B. R. 241; 2 Dill. 45; 5 Amer. Law T. Rep. (U. S. Cts.) 500; Fed. Cas. 8,308.

10. A *feme covert* does not become a surety for her husband by charging her inchoate right of dower for her husband's benefit. *Hiscock, Ass. etc., v. Jaycox & Green*, 12 N. B. R. 507; Fed. Cas. 6,531.

11. An agreement that a *feme covert* is to be compensated for a release of her contingent right of dower is not to be implied. *Id.*

12. Where husband and wife join in a deed so as to release the dower, if the deed be avoided in the hands of a fraudulent grantee, as having been executed by the bankrupt with intent to hinder and defraud creditors, the assignee will be entitled to the land divested of the wife's claim to dower and the husband's right to a homestead. *Cox, Ass., v. Wilder et al.*, 5 N. B. R. 443; Fed. Cas. 3,309.

13. Certain land belonging to a bankrupt was sold by the assignee in pursuance of an order of court. The bankrupt had a wife living who claimed dower in said real estate. *Held*, that the sale did not divest her dower interest. *Lazear v. Porter, Ass.*, 18 N. B. R. 549.

### DRAFT.

See COMMERCIAL PAPER.

### EMBEZZLEMENT.

See FRAUD, 107.

### ENDORSERS.

See COMMERCIAL PAPER, IX, X, XIV.

### ENJOINING PROCEEDINGS.

See INJUNCTION.

### EQUITY.

See COMPOSITION, 60; INJUNCTION, 14; MANDAMUS, 1; PLEADING AND PRACTICE, 210; STOCKHOLDERS, 17; USURY, 9.

1. Proceedings in bankruptcy are in the nature of equity proceedings. In *re Wallace*, 2 N. B. R. 52; *Deady*, 433; Fed. Cas. 17,094.

2. Upon general principles of equity jurisdiction the mortgagor of chattels has no equity of redemption therein, and it may be enforced in the United States circuit court when that court has jurisdiction of the parties or subject-matter. *Foster, Ass., v. Ames*, 2 N. B. R. 147; 1 Lowell, 813; Fed. Cas. 4,965.

3. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law when parties have submitted their rights to the jurisdiction of the court without objection. *Post v. Corbin, Ass.*, 5 N. B. R. 12; Fed. Cas. 11,299.

4. A demurrer to a bill in equity brought by the assignee on the ground that there is a complete remedy at law will be overruled when it appears that questions of fraud, trust and partnership are involved. *Taylor, Ass., v. Rasch et al.*, 5 N. B. R. 399; Fed. Cas. 13,801.

5. Where the complainant knows what the goods transferred by bankrupt are, he cannot claim equity jurisdiction on the ground of discovery because he is ignorant of their precise amount. *Garrison, Ass., v. Markley*, 7 N. B. R. 246; Fed. Cas. 5,256.

6. The plea of bankruptcy is not an equitable but a purely legal defense. *Medbury v. Swan*, 8 N. B. R. 537.

7. The assignee must sue in equity if conversion of property was prior to the filing of petition in bankruptcy. *Mitchell v. McKibbin*, 8 N. B. R. 548; Fed. Cas. 9,666.

8. Where bill must be dismissed for want of equity, jurisdiction will not be retained to settle priorities or equities between the defendants, but a court of equity may sell free from, or subject to, prior incumbrances. *Sutherland et al. v. Lake* Sup. S. C., R. R. & I. Co., 9 N. B. R. 298; Fed. Cas. 18,643.

9. A corporation must answer a bill in equity under its common seal, and is not required to answer any interrogatories, except such as by the note at the foot of the bill it is required to answer, and the agents and officers cannot be required to answer the interrogatories unless they are made defendants. *French, Ass., v. Bank*, 11 N. B. R. 189; Fed. Cas. 5,099.

10. Courts of law and equity cannot insert in section 2 of the bankrupt act (1867), limiting the time for the commencement of suits by the assignee, any exception. *Andrews, Ass., v. Dole et al.*, 11 N. B. R. 852; Fed. Cas. 873.

11. Equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. It does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. *Voight v. Lewis, Trus.*, 14 N. B. R. 543; 11 Phila. 511; 33 Leg. Int. 402; 9 Chi. Leg. News, 65; 11 Bankers' Mag. (3d S.) 481; 8 N. Y. Wkly. Dig. 421; 24 Pittsb. Leg. J. 54; Fed. Cas. 16,989.

## ESTATE.

### I. CONTROL OF COURT THEREOVER.

#### II. TRUSTEES.

- (a) *Trustee's Title in General.*
  - (1) Limitations Thereon.
  - (2) Non-passage of Title.
  - (3) Passage of Title.
  - (4) When Effective.
- (b) *Assignments.*
- (c) *Collaterals.*
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### II. TRUSTEES — continued.

- (i) *State Courts, Executions by Sheriff, etc.*
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### IV. CORPORATIONS.

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### XI. PROPERTY OF THIRD PERSONS.

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### XIII. MISCELLANEOUS DECISIONS AS TO TITLE.

See DISCHARGE, 106, 189, 191; DIVIDENDS, 82; ESTOPPEL, 9; INSOLVENCY, 8; JUDGMENT, 15, 41, 50; LIEN, 49, 59; MARSHAL, 8; PETITIONS, 136, 137; PLEADING AND PRACTICE, 153, 169, 176, 201, 255, 258, 270; SALES, 5, 8, 80, 84, 69, 75, 94; SCHEDULES, 24; SECURED CLAIMS, 5; STATUTORY CONSTRUCTION, 65; STATUTE OF LIMITATIONS, 48; STOCKHOLDERS, 80; TAX, 8; USURY, 8.

### I. CONTROL OF COURT THEREOVER.

See COURTS; BANKS, 82; INJUNCTION, 26.

1. The estate surrendered to a district court is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine in any degree the manner of its disposition. In re Barrow, 1 N. B. R. 125; 1 Amer. Law T. Rep. Bankr. 63; Fed. Cas. 1,057.

2. The intent of the act of 1867 is that the federal courts shall have exclusive control of the assets of the bankrupt and distribute the proceeds. *Wilson v. Capuro*, 4 N. B. R. 714 (8 vo. ed.).

3. The assets of such bankrupt individuals and corporations as are within the scope



of the act of 1867 cannot by any power be wrested from the jurisdiction of the courts in bankruptcy. In re Independent Ins. Co., 6 N. B. R. 260; Holmes, 103; Fed. Cas. 7,017.

4. The commencement of proceedings in bankruptcy transfers to the court the jurisdiction over the bankrupt, his estate and all parties and questions connected therewith, and operates as a *supersedeas* of the process in the hands of the sheriff and an injunction against all other proceedings than such as might thereupon be had under the authority of the court until the question of bankruptcy shall have been disposed of. Jones v. Leach, 1 N. B. R. 165; Fed. Cas. 7,475.

5. All property of the bankrupt included in the inventory and schedules comes into the prehensory power of the court as fully as if it were actually and visibly in the presence of the court the moment the voluntary petition is filed, and the court has exclusive control of the same. Byrd, Ass. v. Herrold et al., 18 N. B. R. 433; 26 Pittsb. Leg. J. 123; Fed. Cas. 2,269.

6. The effect of an adjudication in involuntary bankruptcy is to take from the bankrupt the whole of his estate into the control and disposal of the court. The control is retroactive, and reaches back from the day of adjudication to the day of the commencement of the proceedings, invalidating every intermediate transfer of property or payment of offset by the bankrupt. In re Portsmouth Savings Fund Society, 11 N. B. R. 303; 2 Hughes, 239; Fed. Cas. 11,298.

7. State and federal courts have concurrent jurisdiction over actions for the collection of the assets of the bankrupt whether the actions be legal or equitable, and for any amount, subject to the authority conferred by section 71, Revised Statutes, and the amendment of 1874. Wente v. Young et al., 17 N. B. R. 90.

8. A bankruptcy court has power to take possession of personal assets in the hands of a vendee of a bankrupt, purchased before the adjudication in bankruptcy, upon the *ex parte* allegations and proof by the assignee that such sale is fraudulent and void, anterior to a trial upon an issue of title thereto. In re Hunt, 2 N. B. R. 166; 1 Chi. Leg. News, 169; Fed. Cas. 6,881.

9. The court after the commencement of

bankruptcy proceedings becomes vested with all powers and control over the assets previously vested in either the chartered officers of a company or the stockholders, and may make any assessment or call necessary to the collection of the assets, as fully as the stockholders or directors could do if the company had not become bankrupt. Upton v. Hansbrough, 10 N. B. R. 368; 8 Biss. 417; Fed. Cas. 16,801.

## II. TRUSTEES.

See CHOSER IN ACTION, 1; DOWER, 12.

### (a) *Trustee's Title in General.*

#### (1) Limitations Thereon.

10. Only such property as the bankrupt had at the commencement of the bankruptcy proceedings passes to the assignee. In re Patterson, 1 N. B. R. 125 (3 vo. ed.); 1 Ben. 508; Fed. Cas. 10,815.

11. The assignment of a bankrupt's estate to the assignee confers upon him only such title as the bankrupt possessed. Aiken v. Edrington, Sr., et al., 15 N. B. R. 271; Fed. Cas. 111.

12. The assignee in bankruptcy can claim only such interest and right in any property, except in case of fraud, as the bankrupt himself could have claimed at the filing of the petition. Rogers v. Winsor, 6 N. B. R. 246; Fed. Cas. 12,023.

13. In general, only such right, title and interest as the bankrupt himself has in law and equity in any estate or property passes by bankruptcy to the assignee. Hersey v. Elliott, 18 N. B. R. 358.

14. The assignee in bankruptcy has only the title of the bankrupt unless given the right by creditors to assail fraudulent transfers, and title to property conveyed by the bankrupt contrary to the provisions of the bankrupt act. Johnson, Ass. v. Rogers et al., 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

15. The bankrupt law takes the estate of the bankrupt into custody of its court and transfers it to the assignee, subject to such liens by way of preferences as existed more than four months before the petition in bankruptcy. Alderdice, Ass. v. State Bank of

Va. et al., 11 N. B. R. 398; 1 Hughes, 47; Fed. Cas. 154.

16. By section 14 of the act of 1867 the assignee takes the property of the bankrupt with the like right, title, power and authority to sell said property as the bankrupt could have done. He acquires no other or better title to the property than the bankrupt had, and if there was a lien on the property in the hands of the bankrupt, the same lien follows the property in the hands of the assignee. *In re Winn*, 1 N. B. R. 131; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

17. Assignees in bankruptcy, except in cases of fraud, take only such rights and interests in the property of the bankrupt as he himself had and could have himself claimed and asserted at the time of his bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. *Barnard et al., Ass., v. N. & W. R. R. Co. et al.*, 14 N. B. R. 469; 4 Cliff. 351; 3 Cent. Law J. 608; 5 Amer. Law Rec. 361; 22 Int. Rev. Rec. 312; Fed. Cas. 1,007.

18. The title of the assignee to property of a bankrupt is subject to all the rights and equities which would have affected such property while in the hands of the bankrupt, before the adjudication in bankruptcy. *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 10 N. B. R. 44.

19. Except in cases of fraud, assignees in bankruptcy take only such rights and interests as the bankrupt could claim and assert at the time of his bankruptcy. All the equities which would affect the bankrupt will also affect the assignee. *In re Dow*, 6 N. B. R. 10; Fed. Cas. 4,036.

20. The trustee or assignee in bankruptcy takes the property subject to all legal and equitable claims of others. *Hayes v. Dickinson*, 15 N. B. R. 350.

21. The act of 1867 does not in general vest in the assignee any more beneficial interest in the debtor's estate than his execution creditors could, under the laws of the respective states already in force, have obtained under adversary proceedings. *In re Appold*, 1 N. B. R. 178; 7 Amer. Law Reg. (N. S.) 624; 6 Phila. 469; 25 Leg. Int. 180; 1 Amer. Law T. Rep. Bankr. 83; Fed. Cas. 499.

22. A conveyance of real estate made to defraud creditors is not void, but voidable; and the property so conveyed does not absolutely vest in the assignee as part of the bankrupt's estate. *Phelps et al. v. Curtis*, 16 N. B. R. 85.

23. Where a levy is not made at the date of the bankruptcy, the title by operation of law is vested in the assignee, who must make the sale and deposit the proceeds subject to whatever claims may be made upon it. *Pennington v. Sale & Phelan et al.*, 1 N. B. R. 157; 2 Amer. Law Rev. 776; Fed. Cas. 10,939.

24. The vacation of an attachment by proceedings in bankruptcy does not enlarge the lien of judgment creditors under subsequent executions; but such vacation operates to vest the property in the assignee free from incumbrance to the extent of the attachment, and subject to the liens of the judgment creditors as to the excess. *In re Nelson*, 16 N. B. R. 312; 9 Ben. 238; Fed. Cas. 10,100.

25. Upon the dissolution of an attachment by the commencement of proceedings in bankruptcy, title to the property attached vests in the assignee, subject to the lien of the sheriff thereon for his fees which accrue prior to the filing of the petition. *In re Housberger*, 2 N. B. R. 88; 2 Ben. 504; Fed. Cas. 6,734.

26. Where property upon which there is an attachment lien is delivered to a receiptor, the lien follows the property into the hands of the debtor's assignee. *Rowe v. Page*, 13 N. B. R. 366.

27. Where, under a written contract, ownership of personal property is not to pass to the vendee until the full amount of the stipulated price is paid, the assignee in bankruptcy is not entitled to the property unless he makes payment of the balance due. *In re Lyon*, 7 N. B. R. 182; 4 Chi. Leg. News, 421; Fed. Cas. 8,644.

28. An assignee in bankruptcy in New York who gets possession of goods subsequent to the delivery to the sheriff of an execution holds the goods subject to the lien of the execution even where there has been no actual levy by the sheriff. *In re Paine*, 17 N. B. R. 87; 9 Ben. 144; Fed. Cas. 10,673.

29. Upon an assignee's petition to set aside two deeds for property, the first made by a sheriff by virtue of an execution in fraud of the bankrupt act, the second to a *bona fide* purchaser, for value, without notice, from the person to whom the fraudulent deed was given, *held*, that the assignee had no greater rights than a judgment creditor; and though the first deed may be a mere cover, a *bona fide* purchaser will be protected. *Beall v. Harrell et al.*, 7 N. B. R. 400; Fed. Cas. 1,163.

30. When an assignee sells incumbered property without any special order of the court, he sells it subject to all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done. *Ray v. Brigham et al.*, 12 N. B. R. 145; 23 Wall. 128.

31. If a person has the goods of another under agreement to sell the same on shares, and learning that the owner has become insolvent induces the latter to execute a bill of sale of the property, the sale is void as to creditors, but the assignee acquires no greater rights than the bankrupt himself possessed, nor has the other party to the bill of sale gained or lost any rights by reason of the said bill of sale. *Avery, Ass., v. Hackley, Ex'x*, 11 N. B. R. 241; 20 Wall. 407.

32. A. loaned money to B. and took a conveyance of B.'s land, which he reconveyed to B. and wife on the payment of a certain sum annually during the life of A., at whose death B. and wife should have the fee. B. and wife (a daughter of A.) released all rights to A.'s estates. The wife died, then A. B. became bankrupt. The annual sum was paid until the death of wife. *Held*, B. and wife were tenants by the entirety; that B.'s assignee was entitled to the land subject to a lien in favor of A.'s administrator for sums due from death of wife to death of A., with interest. *Atwood, Ass. et al., v. Kittel et al.*, 17 N. B. R. 406; 9 Ben. 473; Fed. Cas. 641.

## (2) Non-passage of Title.

33. A tenant who occupies land under an agreement to pay rent, with provision for ouster and distraint upon default, has no such interest in the land as will pass to his assignee. *In re O'Dowd*, 8 N. B. R. 451; Fed. Cas. 10,439.

34. A., being indebted to a bank in which he owned stock, executed an irrevocable power of attorney to the cashier to transfer such to the bank or any other person, with power to appoint a substitute. A. afterwards became bankrupt and the cashier died. A.'s assignee claimed the security on the ground that the power was revoked. *Held*, that it was not revoked. *Lightner, Ass., v. First Nat. Bank of Strasburg et al.*, 15 N. B. R. 69.

35. A bankrupt sold a saw-mill to D., and agreed to furnish stock for said mill at a specified rate, the logs and timber to be held as property of the vendor until manufactured into lumber and divided. D. formed a partnership under name of D. & Co., which became vested with D.'s interest in the contract. The sheriff, under execution against D. & Co., seized logs taken from the bankrupt's lands under contract, and lumber at the mill, which had not been divided. In an action by the assignee, *held*, that where delivery of exclusive possession of goods accompanies an absolute or conditional sale, reservation of a lien or right of property in the vendor will not protect them from the vendee's creditors. *Euwer, Ass. etc., v. Van Giessen et al.*, 19 N. B. R. 263.

36. A banking society for ten years had not conducted its business as a bank, but for seven years had pursued a policy of liquidation by set-off. The deposits became a commodity and were not paid, but simply represented by papers in the form of checks, which were good as set-offs in favor of debtors of the society. *Held* that, as these papers did not represent money, were not payable at sight, and limited in negotiability, they were not checks, but mere evidences of assignment of choses in action, and that parties selling these papers were not responsible to an assignee of the society for their face value. *Harmanson, Ass., v. Bain et al.*, 15 N. B. R. 173; 1 Hughes, 188; Fed. Cas. 6,072.

## (3) Passage of Title.

37. The assignee in bankruptcy is entitled to specific property for which the bankrupt had made an agreement for the purchase. *In re Wood Machine Co.*, 9 N. B. R. 395; 5 Sawy. 576; Fed. Cas. 17,980.

38. The act of 1867 vests all the property

of the bankrupt in the assignee, including property attached on mesne process made within four months next preceding the commencement of proceedings. *Reed v. Bullington*, 11 N. B. R. 408.

39. Vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of property, pass to the assignee. *Phelps v. McDonald*, 99 U. S. 298; *Williams v. Heard*, 140 U. S. 529.

40. If no attachment has been made within four months before commencement of proceedings in bankruptcy, and if there has been no conveyance in fraud of creditors, the title of the assignee is the same as that of the bankrupt. *Donaldson, Ass., v. Farwell et al.*, 15 N. B. R. 277; 93 U. S. 631.

41. Property of the bankrupt, wherever situate, which is not exempted from the operation of the bankrupt act, passes to the assignee, who is an officer of the bankrupt court. This is equally true of property under mortgage as of that which is unincumbered. *Markson & Spaulding v. Heaney*, 4 N. B. R. 165; 1 Dill. 497; 3 Chi. Leg. News, 153; Fed. Cas. 9,098.

42. Title to property mortgaged by a bankrupt, but in his possession at the commencement of proceedings in bankruptcy, passes to his assignee, and if possession has been obtained subsequent thereto by the mortgagee or one claiming in his right, the assignee is entitled to recover in specie, or, if that is impossible, the value of the property when taken. *In re Rosenberg*, 3 N. B. R. 33; 3 Ben. 866; Fed. Cas. 12,055.

43. A register has the right to convey the estate of the bankrupt to the assignee if there be no one before him contesting the appointment of an assignee, although title to the property is in dispute. *In re Wylie*, 2 N. B. R. 53; 1 Chi. Leg. News, 30; Fed. Cas. 18,109.

44. Property that has been conveyed by a bankrupt in fraud of his creditors prior to the passage of the bankrupt act becomes vested in the assignee in bankruptcy by force of that act and by virtue of the proceedings thereunder. *Stewart v. Isidor et al.*, 1 N. B. R. 129.

45. A seat in a stock exchange board is property and passes to the assignees in bankruptcy. *Sparhawk v. Yerkes*, 142 U. S. 1.

46. Where it appeared that the bankrupts

fraudulently put into the hands of the defendant C. certain sums of money which C. invested in stocks after the adjudication of the bankrupts, at their request, the assignee, plaintiff, was decreed to be entitled to the stocks, and to a decree that C. vest in the plaintiff the title to the same, and pay the costs of suit. *Hyde, Ass., v. Cohen et al.*, 11 N. B. R. 461; Fed. Cas. 6,967.

47. A sale of the debtor's land on execution and levy after the beginning of bankruptcy proceedings will not pass title against the assignee, although the judgment lien was created prior to the proceedings. *Davis v. Anderson*, 6 N. B. R. 146; Fed. Cas. 3,623.

48. Attachments made within four months of the commencement of proceedings in bankruptcy being dissolved, the property attached rests in the assignee. *Bowman v. Harding*, 4 N. B. R. 5.

49. In taking possession of the bankrupt's estate the assignee takes the place of a sheriff or marshal, and, if the property would not be recoverable from a sheriff or marshal, it is not recoverable from him. *Aiken v. Edrington, Sr., et al.*, 15 N. B. R. 271; Fed. Cas. 111.

50. The equities of creditors of a bankrupt, to whom property was fraudulently transferred before bankruptcy, and of creditors of the transferor, are equal, and the assignee of the bankrupt cannot be required to surrender such property. *Id.*

51. A bankrupt owned property which he had only partly paid for, and left the possession and rent of it in the seller, under an agreement whereby the seller was to apply the rent to the reduction of the purchase-money. *Held*, this does not convey such an interest in the property back to the vendor as will prevent the full title from vesting in the assignee in bankruptcy. *Hall v. Scovell*, 10 N. B. R. 295; Fed. Cas. 5,945.

52. The bankrupt, immediately previous to his bankruptcy, had a fee-simple in a street, subject to the public easement, which street then terminated in a lake, but accretions now exist between the street and the lake shore. *Held*, that the interest of the bankrupt at the time of his decree in bankruptcy passed to the assignee, and by mesne conveyances came from him to the defendant, and that the right of accretion was a

vested right and passed with it to the assignee. *Kinzie v. Winston*, 4 N. B. R. 21; Fed. Cas. 7,835.

53. A judgment for deficiency under sale of property under a mortgage is not a lien on the property so sold as against an assignee in bankruptcy who has redeemed the property by paying the amount bid at the sale with interest, etc. *Lloyd, Ass. etc., v. Hoo Lue et al.*, 17 N. B. R. 170; 5 Sawy. 74; 1 San Fran. Law J. 392; Fed. Cas. 8,432.

54. Bankrupts owned license to occupy stalls in a market, which was revocable at the will of the city, and its assignment gave the assignee no rights unless consented to by certain municipal officers. The bankrupts paid \$4,000 for the license, and creditors had given bankrupts credit partly on ownership thereof. The city refused to recognize the rights of the assignee under general assignment, and on motion to compel bankrupts to transfer license to him, *held*, that motion should be granted and that license passed to assignee. In *re Gallagher et al.*, 19 N. B. R. 224; Fed. Cas. 5,197.

#### (4) When Effective.

55. Upon the execution and delivery to the assignee by the register of the usual assignment under section 14 of the act of 1867, the title to the property and estate, both real and personal, belonging to the bankrupt, vests in the assignee from the date of the filing of the petition, and no person but the assignee has any right to interfere with it; and to do so would be a contempt of the bankrupt court. In *re Dole*, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,965.

56. The appointment of an assignee under a decree in bankruptcy relates back to the commencement of the bankrupt proceedings, and the instrument required to be executed under the hand of the judge or register assigns and conveys to the assignee all the estate, real and personal, of the bankrupt, including equitable as well as legal rights and interests, and things in action as well as those in possession, which belonged to the debtor at the time the petition in bankruptcy was filed in the district court. *Buchanan et al. v. Smith*, 7 N. B. R. 513; 16 Wall. 277.

57. The appointment of an assignee in bankruptcy relates back, and gives to him title to all the estate, real and personal, legal and equitable rights, interests and things in action which belong to the debtor on the prosecution of the petition. *Smith v. Buchanan et al.*, 4 N. B. R. 133; 3 Alb. Law J. 97; 8 Blatchf. 153; Fed. Cas. 13,016.

58. By the provisions of the bankrupt act (1867), the assignment relates back to the commencement of the proceedings in bankruptcy, and the title to all the property, both real and personal, shall vest in the assignee. In *re Pierson*, 10 N. B. R. 109; Fed. Cas. 11,153.

59. The title of an assignee generally relates back only to the commencement of proceedings in bankruptcy, but in case of transfers void as to him his title relates back to the time of such transfer. In *re Biesenthal et al.*, 15 N. B. R. 228.

60. Title to all goods in the possession of the bankrupt at the date of filing his petition passes to the assignee, and goods subsequently obtained from the bankrupt on a writ of replevin may be recovered by the assignee. In *re Vogel*, 3 N. B. R. 49; 7 Blatchf. 18; 1 Amer. Law T. Rep. Bankr. 170; 2 Amer. Law T. 154; Fed. Cas. 16,982.

61. The property of a bankrupt vests in his assignee as of the date of the commencement of proceedings, and no payment by or to him subsequent to that date is valid, even though made or received *bona fide* or without notice. This, however, applies only to transactions which took place prior to such date. *Mays v. Mfg. Nat. Bank*, 4 N. B. R. 147.

62. An assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed. In *re Wynne*, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

63. All the rights and the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the bankruptcy act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. *Id.*

64. The fourteenth section of the bankrupt act of 1867 vests the title to all the property, both real and personal, in the assignee from the time of the commencement

of the proceedings in the bankrupt court, except such property as is specially exempt from levy and sale by the laws of the state. *Lumpkin v. Eason*, 10 N. B. R. 549.

65. By the fourteenth section of the act of 1867, the title to all the property of the bankrupt was, by operation of law, vested in the assignee from the time of the commencement of proceedings, and although the bankrupt's property was attached on mesne process within four months prior thereto, such process was dissolved. *Morris v. Davidson*, 11 N. B. R. 454.

66. An attachment was sued out within four months prior to institution of proceedings in bankruptcy. Plaintiffs claimed that their judgment operated as a lien on the property. *Held*, that there was no time at which the lien could attach, as the adjudication dissolved the attachment and the deed of assignment related back and vested the title in the assignee as of the date of the filing of the petition in bankruptcy (act of 1867). *In re Badenheim et al.*, 15 N. B. R. 370; *Fed. Cas.* 716.

### (b) *Assignments.*

See ASSIGNMENTS; COMMERCIAL PAPER, 64.

67. Where an assignment is made for the benefit of creditors, the title to property so assigned vests in the common-law assignee until such assignment is set aside, and does not vest in the assignee in bankruptcy by the mere force of the adjudication and his appointment as assignee. *Belden, Ass. etc., v. Smith et al.*, 16 N. B. R. 302; *Fed. Cas.* 1,242.

68. A general assignment for the benefit of creditors was made, after which proceedings in bankruptcy were instituted, and assignor was adjudged a bankrupt and an assignee appointed. *Held*, that the title to property assigned remained in the common-law assignee until that assignment was set aside, and did not vest in the assignee by the mere fact of the adjudication and his appointment. *Id.*

69. After a general assignment for the benefit of creditors, without preference, a creditor recovered a judgment against the assignor, and docketed it in the county where debtor's real estate was situated. *Held*, that the judgment was not a cloud upon the title of the land assigned. *Id.*

70. A bankrupt made an assignment to S., whose attorney was also attorney for the bankrupt and for a creditor, and payments were made by the attorney from the proceeds of the assigned estate to S. and the creditor. *Held*, that the assignment was void, and the attorney, S. and the creditor must deliver such estate or the proceeds thereof to the assignee in bankruptcy. *In re Meyer*, 2 N. B. R. 137; 1 *Chi. Leg. News*, 210; *Fed. Cas.* 9,515.

71. A. made a general assignment under the laws of New York. Afterward he was adjudicated an involuntary bankrupt. Assignee in bankruptcy brought an action against the assignee under the state law for possession of the property. *Held*, that the first assignment was valid, and the assignee could hold the property. *Von Hein, Ass., v. Elkus et al.*, 15 N. B. R. 194; *sec.* 14.

72. Debtors made a general assignment. Before proceedings in bankruptcy the sheriff levied upon the property. The bankrupt court permitted a sale, and the sheriff was directed to pay the proceeds to the assignee in bankruptcy, subject to the sheriff's lien, if any. The assignee under the general assignment, before adjudication but after filing of petition in bankruptcy, began action of trespass against the sheriff. Judgment was rendered for the sheriff on the ground that the assignment was fraudulent as to creditors. *Held*, that the sheriff was entitled to the proceeds of the sale, and that the assignee in bankruptcy must claim under the voluntary assignee. *In re Biesenthal et al.*, 18 N. B. R. 120.

73. A debtor made a voluntary assignment for the benefit of creditors more than three months prior to filing a petition in bankruptcy. *Held*, that the assignee in bankruptcy had no right to the possession of the property assigned. *In re Kimball et al.*, 16 N. B. R. 188; *Fed. Cas.* 7,770.

74. A decree annulling a voluntary assignment for equal benefit of all creditors, made within six months of proceedings under which the debtor was adjudged a bankrupt, should contain a direction for a conveyance by the voluntary assignee, surrendering the estate to the assignee in bankruptcy. *Burkholder et al. v. Stump*, 4 N. B. R. 191; 8 *Phila.* 172; *Fed. Cas.* 2,165.

75. Title to real estate will not pass under

an assignment of "all the goods, chattels and effects and property of every kind, personal and mixed," of the assignor, for the benefit of his creditors. *Rhoads v. Blatt*, 16 N. B. R. 32.

76. Where under the New York state statute a voluntary assignment was void as against creditors, but good as against the assignor, there remains no leviable interest in the assignor. In *re Croughwell*, 17 N. B. R. 337; 9 Ben. 360; Fed. Cas. 3,440.

77. Six months prior to bankruptcy proceedings the bankrupt made a voluntary assignment. The plaintiff was afterwards, and before filing of petition, appointed receiver in proceedings supplementary to execution. In a suit against bankrupt, assignee in bankruptcy and voluntary assignee to set aside voluntary assignment as void, *held*, that property covered thereby was "property transferable to and vested in assignee;" and that all persons having an interest therein to be affected by decree were properly joined as defendants. *Onley, etc. v. Tanner et al.*, 19 N. B. R. 178; Fed. Cas. 10,506.

78. Prior to bankruptcy proceedings bankrupt made a voluntary assignment to R, who took possession but failed to give bond. Under a provisional warrant the marshal took possession of property transferred to R. Subsequently R. was removed and a new trustee appointed. On motion by trustee to vacate warrant, and for order directing marshal to deliver property to him, *held*, that provisional warrant did not authorize marshal to take possession, and that motion be granted on condition that trustee release marshal from damages, pay his fees and receive property, provided he shall not dispose of it until reasonable time after appointment of assignee or termination of proceedings, except with approval of court. In *re Manahan*, 19 N. B. R. 65; Fed. Cas. 9,003.

79. A voluntary assignee is a mere representative of the assignor and takes his choses in action, not as purchaser for value, but subject to all the equities attaching to them. *City Bank of Harrisburg v. Sherlock*, 16 N. B. R. 62.

#### (c) *Collaterals.*

80. The collaterals given by the bankrupt for a usurious loan cannot be recovered by the assignee unless he tender the amount

actually loaned to the bankrupt. *Wheelock, Ass. etc., v. Lee*, 17 N. B. R. 563.

81. It is not a conversion to the pledgee to refuse to surrender the property to the assignee unless the assignee redeems it, even if the pledgee does not prove his claim. *Yeatman v. New Orleans Saving Institution*, 17 N. B. R. 187; 95 U. S. 764.

82. Where by the articles of stockbrokers' association, a seat in it, in the event of insolvency of the member, is required to be disposed of and the proceeds applied first exclusively to the payment of debts due other members, *held*, that the assignee of the bankrupt broker is only entitled to the surplus after other members are paid in full. *Hyde, Ass., v. Woods et al.*, 10 N. B. R. 54; 1 Amer. Law T. Rep. (N. S.) 354; 2 Sawy. 655; Fed. Cas. 6,975.

#### (d) *Creditors.*

See CLAIMS, 65; COSTS, ETC., 17.

83. The claim of an assignee duly appointed will prevail against a debtor who has made a payment to his creditor after the filing of the petition, notwithstanding it was made *bona fide* and without knowledge of the bankruptcy proceedings. Opinion of Atty. Gen., 9 N. B. R. 117.

84. A surety took a transfer of property from the principal, sold it, and with part of the proceeds paid a creditor who had no knowledge as to the source of the money, but accepted it in discharge of the surety's obligation. *Held*, that the assignee of the principal could not recover the money from the creditor. *Tyler, Ass. etc., v. Brock et al.*, 17 N. B. R. 239.

85. Where goods are obtained through a misrepresentation, by a firm composed of three members, a return of the goods or their proceeds to the creditor will be valid, as against the assignee of two of the partners, if the goods have not lost their identity, so as to form a part of the property of the bankrupt. *Montgomery, Ass., v. Bucyrus Machine Works*, 14 N. B. R. 193; 92 U. S. 257.

86. By the terms of a composition the creditors were to receive seventy per cent. of their claims: but it was secretly agreed between the debtor and one creditor that in consideration of the latter signing the composition, his composition note should be

immediately discounted at fifty per cent. cash, which was done. *Held*, that the assignee was entitled to recover the amount so paid with costs. *Bean v. Amsink*, 8 N. B. R. 228; 10 Blatchf. 361; Fed. Cas. 1,167.

87. Payments made by creditors to a bankrupt after the filing of the petition in bankruptcy are invalid as against the assignee. *In re Hayden*, 7 N. B. R. 192; Fed. Cas. 6,257.

88. Where debtors told one of their creditors of their embarrassment and insolvency, for the purpose of protecting their surety, and better securing the collection of the debts by the prompt seizure of their property in execution, and the creditor immediately issued execution, *held*, that the assignee was entitled to the property, or to the value of it. *Vogle v. Lathrop*, 4 N. B. R. 146; 8 Pittsb. Rep. 268; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,985.

89. A creditor who obtains payment of his debt under a judgment, through the passive non-resistance of the debtor, is not liable to repay the money to the assignee. *Henkelman et al. v. Smith, Ass.*, 12 N. B. R. 121.

90. Where the assignee has recovered against a preferred creditor, the creditor may prove his debt if he has not actually assisted in the fraud. *In re Black et al.*, 17 N. B. R. 399; Fed. Cas. 1,459.

91. A creditor will not be allowed, pending proceedings in the bankruptcy court, to appropriate property of the bankrupt exclusively to his debt. According to the spirit of section 14 of the act of 1867, the property of the bankrupt vests in the assignee for the benefit of creditors, and he has the same remedies they would have had to reach and subject it to the payment of the debts of the estate. *Allen & Co. v. Montgomery et al.*, 10 N. B. R. 503.

### (e) *Interest Under Wills.*

92. A will devised bonds to A., B. and C. and their heirs, and provided against alienation and that rents and profits be paid them by executors; in case of death of either A., B. or C. without lawful issue the share of such one to go to the survivors and heirs forever. At death of testator C. had several children living. *Held*, the remainder to issue of C. was vested and alienable and passed to a general

assignee in bankruptcy during the life of C. *Smith v. Scholtz et al.*, 17 N. B. R. 520.

93. Where a will gives a trustee an absolute discretion, which he is not obliged to exercise in favor of the bankrupt, the bankrupt has not such an interest as his assignee can establish. *Nichols, Ass. v. Eaton et al.*, 13 N. B. R. 421; 91 U. S. 716.

94. A testatrix made a devise to her son, to cease on his being adjudged a bankrupt. He became bankrupt, and his assignee brought a bill to subject the income devised to his administration. *Held*, that the limitation on the devise was valid. *Id.*

95. A provision in a will devising land to a wife for life, with remainder to her husband in fee, that the property so devised shall in no wise be liable for the payment of the debts of the husband, is limited by and applies only during the life of the wife. *In re Myrick*, 3 N. B. R. 38; Fed. Cas. 10,000.

### (f) *Leases and Rents.*

See RENT, 12.

96. Where under state laws the landlord has a lien for rent, the same will be upheld in a bankruptcy court, and the assignee must take title subject thereto. The landlord will be entitled to prove his claim for the unexpired term of a lease beyond one year, even though he has been preferred under a state law, for his rent up to the end of the year. *In re Wynne*, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

97. A. made a lease for a term of years of a hotel owned by him and assigned the lease to a creditor to secure a debt due. Afterward A. became bankrupt. *Held*, that the assignee must take the estate subject to the lease, and that the law will recognize the assignment and protect the creditor as to his rights in the leased property, there being no preference involved in the transfer. *Meador et al. v. Everett, Ass.*, 10 N. B. R. 421; 3 Dill. 214; 1 Cent. Law J. 453; Fed. Cas. 9,376.

98. A lease executed by the bankrupt prior to the bankruptcy and not recorded, and which is free from fraud as to the creditors of the bankrupt, is valid as against the assignee, though he had no notice of it. *Goss v. Coffin*, 17 N. B. R. 332.

99. Where a judgment was a lien on a



bankrupt's lands, and an assignee was appointed after judgment on a petition filed also after judgment, the rents and profits of the land go to the assignee and not to a receiver of the court where the judgment was had, who was appointed after the filing of the petition. *Conover et al. v. Dumahaut et al.*, 17 N. B. R. 558.

### (g) *Mortgages.*

See MORTGAGES, 45, 80, 135, 139.

100. Where a mortgage was executed just prior to institution of proceedings in bankruptcy, but in pursuance of a parol agreement of several months before, such mortgage was held valid against the assignee. *Burdick, Ass. etc., v. Jackson et al.*, 15 N. B. R. 318.

101. A petition was filed against an insolvent more than two months after making a mortgage, but within two months of the filing of the same. The state registry law provided that the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only" without record. The assignee brought an action to set aside the conveyance. *Held*, that the transfer was not complete until the instrument was recorded, and should be set aside. *Bostwick, Ass., v. Foster*, 18 N. B. R. 123; 14 *Blatchf.* 436; *Fed. Cas.* 1,682.

102. A suit was brought on a mortgage by the assignees of the mortgagee. Defendant pleaded an executory contract with the mortgagor by which the mortgage, then held as collateral security by a third party, should be redeemed. The assignees had redeemed the mortgage, and defendant alleged that they held it in the same way as the bankrupt would have held it. *Held*, that it was an asset in their hands for the benefit of general creditors. *McLean et al., Ass., v. Cadwalader*, 15 N. B. R. 383.

103. The assignee takes the property of the bankrupt subject to all equities and liens (other than certain attachments) as held by him; and a mortgage which, under state law, was valid as between the bankrupt and his grantees, though not recorded, must be held valid between the bankrupt's trustee and them. *Potter et al. v. Coggeshall*, 4 N. B. R. 19; *Fed. Cas.* 11,323.

104. Where a mortgagor was declared bankrupt and his rights of property were vested in the assignee, who conveyed by deed, it vested in the purchaser such title as the bankrupt had at the date of the decree declaring him a bankrupt. *Cleveland Ins. Co. v. Reed*, 24 *How.* 284.

105. Defendants took possession of goods of the bankrupt, some months before commencement of proceedings, under a mortgage, and converted them to their own use. The assignee brought an action of trover. *Held*, he could not recover. *Jones v. Miller, Ass. etc.*, 17 N. B. R. 316; 1 N. J. Law J. 113; *Fed. Cas.* 7,482.

106. A mortgage of personal property being, under the laws of the state (Wisconsin), ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee. *In re Eldridge*, 4 N. B. R. 162; 2 *Biss.* 362; 3 *Chi. Leg. News*, 177; *Fed. Cas.* 4,330.

107. A. gives to B. a chattel mortgage and bill of sale which, under the state statute of frauds, are void except between the parties thereto. *Held*, the assignee may recover the property, or the value thereof, from the mortgagee who took possession. *Edmonson v. Hyde*, 7 N. B. R. 1; 2 *Sawy.* 205; 5 *Amer. Law T. Rep. (U. S. Cts.)* 380; *Fed. Cas.* 4,285.

108. A bankrupt executed a chattel mortgage August 12, which was not recorded till November 29. Bankruptcy proceedings were instituted December 12. In suit against assignee in bankruptcy, *held*, that where, under a state law, chattel mortgages are void as to all creditors who became such between the giving and recording of mortgage, the district court will adopt such construction and hold the mortgage void as to the assignee of mortgagor where debts were contracted after execution of the mortgage. *In re Oliver & Young*, 19 N. B. R. 291; *Fed. Cas.* 10,492.

109. Bankrupt, in March, gave a chattel mortgage for \$30,000 to secure payment of amount due, and for future consignments. Said mortgage was not filed, and on August 14 was assigned to W., who gave his note for \$30,000. W. had not means to pay said notes unless mortgaged property were worth nearly amount paid for it. At time of assignment bankrupt was insolvent. W. filed mortgage August 15, foreclosed it, and pur-

chased property for \$18,000. On same day bankrupt leased the property to W., who carried on business in name of bankrupt's son. Bankrupt made a general assignment. August 31 petition was filed by creditors and bankrupt adjudicated. In suit by assignee, *held*, that while mortgage was not fraudulent preference under bankrupt law, it was void under state laws. *Platt v. Preston et al.*, 19 N. B. R. 241; Fed. Cas. 11,219.

110. The mere retention and use of personal property until default is a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. *Robinson et al. v. Elliott, Ass.*, 11 N. B. R. 553; 22 Wall. 513.

111. An assignee redeemed certain real estate with general funds at the request of subsequent incumbrancers. After the sale of the real estate it was held that the general fund should be reimbursed out of the proceeds of the sale. In *re Longfellow et al.*, 17 N. B. R. 27; 2 Hask. 221; Fed. Cas. 8,486.

#### (h) *Rights of Action.*

112. Rights of action for torts to debtor's person do not pass to the assignee. *Wright, etc. v. Bank*, 18 N. B. R. 87; 18 Alb. Law J. 115; 10 Chi. Leg. News, 348; 6 Reporter, 229; 26 Pittsb. Leg. J. 11; Fed. Cas. 18,078.

113. If one to defraud his creditors conveys, when in failing circumstances, his property to another having knowledge of the facts, and is afterward adjudged bankrupt, the transaction is void and the title vests in the assignee as soon as he is appointed, and he may sue to recover possession. *Bolander v. Gentry*, 2 N. B. R. 256 (8 vo. ed.).

114. An assignee may recover property that has been transferred in fraud of the bankrupt act by the bankrupt, even though the property be in the hands of a subsequent purchaser, with notice only that a legal advantage had been taken. *Harrell v. Beall*, 9 N. B. R. 49; 17 Wall. 590.

115. A suit brought for fraudulently recommending a person as worthy of trust and confidence is not a claim that passes to the assignee. In *re Crockett*, 2 N. B. R. 20 (8 vo. ed.).

116. On petition to vacate a discharge,

*held*, that a cause of action *ex delicto* is not within the description of assets which pass to the assignee under Revised Statutes, section 5056. In *re Brick*, 19 N. B. R. 508.

117. A right of action for a mere personal injury does not pass to the assignee. If the assignee does not intervene, a pending action may be prosecuted in the name of the bankrupt. *Noonan v. Orton*, 12 N. B. R. 405.

118. An action for the malicious abuse of the garnishee process is an action for a personal injury, and does not pass to the assignee. *Id.*

119. A naked averment that the assignee's title was fraudulently concealed from him by the bankrupt, and by the bankrupt's fraudulent grantees for more than two years after the assignee's title accrued, will not avoid the operation of the bankrupt law. It should, at least, be averred that the assignee used due diligence in attempting to discover property, and was baffled in the attempt; but it is a question whether even such averment would save the right of action. *Andrews, Assa. etc., v. Dole et al.*, 11 N. B. R. 352; Fed. Cas. 373.

120. Where one recovers a judgment prior to being adjudged a bankrupt, which judgment, after the adjudication and the conveyance to the assignee, is amended to slightly increase the amount, the original judgment and the cause of action thereon pass to the assignee, subject to all the rights of the bankrupt to have it corrected. *Zantzinger v. Ribble, Ass.*, 4 N. B. R. 724 (8 vo. ed.).

121. Rights to property fraudulently transferred pass to the assignee in bankruptcy, and the bankrupt's creditor cannot assert them in his own name. *Trimble v. Woodhead*, 102 U. S. 647.

#### (i) *State Courts, Executions by Sheriff, etc.*

122. The United States district court has no authority to order property to be taken out of the hands of the sheriff, who holds by virtue of an execution issued upon a judgment obtained in a state court, and the lien under the execution is *prima facie* valid; and until the writ is set aside for fraud or violation of the bankrupt law, the assignee cannot have possession before satisfaction of

such judgment. *In re Shuey*, 9 N. B. R. 526; 6 Chi. Leg. News, 248; Fed. Cas. 12,821.

123. Liens by attachment or execution obtained in the state courts prior to proceedings in bankruptcy take preference to assignee's claims, unless an intent to evade the bankrupt act is shown. *Appleton v. Bowles et al.*, 9 N. B. R. 354.

124. An assignee in bankruptcy may sue in a state court for the enforcement of any right vested in him by the bankrupt act, as for the recovery of property transferred in fraud of that act within the six months prior to commencement of proceedings. *Cook v. Waters et al.*, 9 N. B. R. 155.

125. When at the time bankruptcy proceedings are instituted property is in the hands of the sheriff, under attachments issued out of the state courts, the assignee should apply to the state and not the federal courts to obtain possession. *Johnson v. Bishop*, 8 N. B. R. 533; 21 Pittsb. Leg. J. 77; Fed. Cas. 7,873.

126. The possession of goods by a sheriff obtained by an execution on final judgment levied prior to proceedings in bankruptcy cannot be disturbed by an assignee, he being entitled only to the balance remaining in the sheriff's hands after satisfaction of his execution. *Marshall v. Knox et al.*, 8 N. B. R. 97; 16 Wall. 551.

127. Where an attachment was issued against Y. within four months preceding the commencement of proceedings in bankruptcy against him, and served on defendants as debtors of Y., and pending the bankruptcy proceedings a general judgment was recovered in said action, and an execution issued, and the defendants paid to the sheriff the amount of their indebtedness, *held*, that such payment was voluntary and did not discharge their obligation to the bankrupt or his assignee. *Duffield, Ass etc., v. Horton et al.*, 19 N. B. R. 13.

128. More than four months prior to bankruptcy proceedings, deputy sheriff, having writs of attachment against bankrupt, took receipts for property without taking possession. Assignee found property in bankrupt's possession and took it. *Held*, that deputy sheriff's proceedings created no lien upon property as against bankruptcy proceedings. *In re Ashley*, 19 N. B. R. 237; Fed. Cas. 581.

129. A purchased at sheriff's sale, after proceedings commenced in bankruptcy, the levy having been made prior thereto, and the judgments under which the sale took place were afterwards declared void as in fraud of the act. *Held*, purchaser acquires a good title nevertheless. *Zahm v. Fry et al.*, 9 N. B. R. 546; 10 Phila. 243; 31 Leg. Int. 197; 21 Pittsb. Leg. J. 155; Fed. Cas. 18,198.

130. Upon filing his petition a debtor becomes *eo instante* a bankrupt and the property named in his inventory is in the custody of the court, so that creditors to whom a sheriff, having subsequently taken such property into his possession under process of replevin from a state court, had delivered the same, will be required to deliver it or pay the value thereof, if sold, to the assignee. *In re Vogel*, 2 N. B. R. 138; 1 Chi. Leg. News, 210; Fed. Cas. 16,983.

131. A state court having appointed a receiver on a creditor's bill, prior to the commencement of the proceedings in bankruptcy, it will not, on a mere motion, direct the delivery of the property to the assignee. *Freeman et al., Trust., v. Fort et al.*, 14 N. B. R. 46.

132. After it is shown that the defendant has been declared a bankrupt, the court is bound to take judicial notice that all his property and effects were vested, by operation of law, in the assignee. *Morris v. Davidson*, 11 N. B. R. 454.

133. Property in the hands of an assignee in bankruptcy, that may be payable to any creditor, is not subject to attachment against such creditor. *Jackson v. Miller*, 9 N. B. R. 143.

### (j) *Suits by and Against Assignee.*

See ATTACHMENT, 16, 27, 43, 56.

134. An assignee in bankruptcy may prosecute an action in trover for the recovery of property unlawfully and fraudulently transferred by the bankrupt. *Foster, Ass., v. Hackley*, 2 N. B. R. 131; 2 Amer. Law T. Rep. Bankr. 8; 1 Chi. Leg. News, 137; Fed. Cas. 4,971.

135. Sales of property void under a state statute of frauds are also void under the bankrupt law, and an assignee in bankruptcy is authorized to pursue property thus attempted to be transferred, and, as auxiliary

to its recovery, to ask that the sales by the bankrupt be annulled. *Massey et al. v. Allen*, 7 N. B. R. 401; 17 Wall. 351.

136. The right of recovery of property transferred by an insolvent given by section 35 of the bankrupt act of 1867 to the assignee is not a penalty, but has its operation in the vesting of the title in the assignee after the transfer is declared void. *Cook v. Waters et al.*, 9 N. B. R. 155.

137. Where the subject-matter of an action passes to the assignee, he has the election whether or not to prosecute it; and in the event of his refusal to do so, it must be dismissed. *Towle v. Davenport*, 16 N. B. R. 478.

138. An action of tort was brought by the assignee to recover a sum of money alleged to have been paid by the bankrupt in fraud of the bankrupt act. Three payments were shown to have been made to a creditor, two for debts and one for engaging counsel, shortly before the adjudication in bankruptcy. The jury found for the plaintiff. The defendant alleged exceptions, relating mainly to the examination of witnesses. The exceptions were overruled. *Goodrich v. Wilson*, 14 N. B. R. 555.

139. Defendant bought from bankrupt, shortly before commencement of proceedings, certain goods. The sale was made by the bankrupt with evident intent to defraud creditors. In an action by the assignee to recover for the goods it was held the burden of proof was on the plaintiff to show guilty collusion on part of defendants. *Dickinson v. Adams*, 17 N. B. R. 380; 4 Sawy. 257; Fed. Cas. 3,896.

140. Where an assignee has filed a bill in equity to redeem certain real estate, a subsequent incumbrancer cannot redeem and acquire complete title. In *re Longfellow*, 17 N. B. R. 27; 2 Hask. 221; Fed. Cas. 8,486.

141. Where an assignee filed a bill in equity to redeem certain real estate, a subsequent incumbrancer claimed the right to redeem and acquire complete title. *Held*, that he could not maintain it. *Id.*

142. Where creditors' bills were filed and a receiver appointed who obtained possession of the property of the debtor, an assignee in bankruptcy has no right to the property thus secured by law to the payment of debts of judgment creditors. *Sedgwick, Ass., v. Minck*

*et al.*, 1 N. B. R. 204; 6 Blatchf. 156; Fed. Cas. 12,616.

143. A judgment having been obtained before bankruptcy proceedings, execution was issued subsequent to such proceedings and debtor's land sold. Upon equity proceedings to set aside the conveyance, *held*, purchaser cannot hold against assignee. *Davis v. Anderson*, 6 N. B. R. 146; Fed. Cas. 3,623.

144. After proceedings in bankruptcy, defendant paid to the sheriff the amount of judgment recovered against the bankrupt, and attached in his hands, by an attachment issued within four months of commencement of proceedings in bankruptcy. Defendant had no knowledge of the bankruptcy until after the payment. *Held*, that defendant was not relieved of his liability to the assignee. *Duffield et al., Ass., v. Horton et al.*, 16 N. B. R. 59.

145. B. stored a certain quantity of wheat in A.'s elevator and took a receipt which he transferred to C. C. had no knowledge of A.'s insolvency. A. becoming bankrupt, his assignee sued C. for money due by C. to A. *Held*, the receipt could be set off against the assignee's claim. *McCabe, Ass. etc., v. Winship*, 17 N. B. R. 113; Fed. Cas. 8,668.

146. A sheriff levied upon property by virtue of an order to sell under a mortgage foreclosure suit before the debtor filed his petition in bankruptcy, but the sale was made after that time. The assignee sought to set aside the sale and to restrain the debtor. *Held*, petition refused. *Goddard v. Weaver*, 6 N. B. R. 440; 1 Woods. 257; Fed. Cas. 5,495.

147. A broker purchased from another broker shares of stock, the transfer and payment to be made the next day. Payment was made, but the stock was not transferred and thereupon the vendor failed, but upon the request of the vendee, who knew of the failure, gave a certificate of certain of the shares with power of attorney to make the transfer and procured debtor to transfer the remainder. Suit was brought by the assignee to recover the stock. Bill dismissed. *Sparhawk et al., Ass., v. Richards & Thompson*, 12 N. B. R. 74; 1 Wkly. Notes Cas. 510; Fed. Cas. 13,205.

148. A manufacturer who agrees to furnish goods of his manufacture to another at

a fixed price, the latter to pay all freight, storage and charges, and to make a quarterly settlement for all goods sold by him within that time, is not entitled to recover the proceeds of goods sold under such agreement by the bankrupt, from his assignee. Such an agreement creates the relation of vendor and vendee, and not that of principal and agent or factor. In *re Linforth et al.*, 16 N. B. R. 435; 4 Sawy. 870; 1 San Fran. Law J. 199; Fed. Cas. 8,369.

149. An insurance firm secured a loan for the bankrupt, and he left a portion of the money to pay premiums of insurance to the amount of \$30,000, which he was to take out in the company which the firm represented. This money was left, and the insurance was to be procured as a compensation to the firm for obtaining the loan. Half the amount was furnished, and half the fund was applied to the payment of the premium, but no other insurance was furnished. The assignee sought to recover the balance. *Held*, that a recovery could not be had, as the firm had a vested interest. *Newcomb v. Launtz, Ass.*, 18 N. B. R. 276.

150. A bankrupt held shares in a bank, on which the bank claimed a lien, under its by-laws, as security for a debt of the bankrupt. The bank refused to give the certificate of stock to the assignee, and he brought an action to recover the value of the same, alleging that the by-law was void. *Held*, that the assignee cannot maintain the action, as, under the banking law, the bank could not hold the title, and a judgment for conversion would vest the title in the bank. *Meyers, Ass., v. Valley Bank*, 18 N. B. R. 34; Fed. Cas. 9,515.

151. Upon suit by assignee, court set aside certain conveyances by bankrupt as fraudulent. *M.*, one of the defendants in said suit, claimed reimbursement for improvements and moneys advanced to reduce incumbrances. *Held* that, having purchased the property with notice of the fraud, his claim would not be allowed. In *re Mead*, 19 N. B. R. 81; 2 N. J. Law J. 26; Fed. Cas. 9,365.

152. An assignee in bankruptcy brought an action to recover double the amount of usurious interest paid by the bankrupt, basing the action on section 30 of the act of 1867. Defendant demurred on ground that the assignee had no legal capacity to prosecute the

action. *Held*, that the claim was one which would pass to the assignee and he could sue on it. *Wright, etc. v. Bank of Greensburg*, 18 N. B. R. 87; 8 Biss. 243; 18 Alb. Law J. 115; 10 Chi. Leg. News, 848; 26 Pittsb. Leg. J. 11; Fed. Cas. 18,078.

153. Property which had been levied on by the sheriff was by him delivered to the marshal in response to a demand for the bankrupt's property made in execution of a warrant issued by the bankrupt court. *Held*, that the judgment creditor had not a right of action for wrongful taking and conversion against the assignee. *Ansonia Brass & Copper Co. v. Pratt, Ass. etc.*, 16 N. B. R. 170.

154. Assignee more than two years after cause of action accrued sued to recover an ordinary debt due by the defendant to the bankrupt before bankruptcy. *Held*, that the limitation of two years provided by section 2 (act of 1867), only applied where the proceeding was plenary, and he could recover. *Smith v. Crawford*, 9 N. B. R. 38; 6 Ben. 497; Fed. Cas. 13,030.

155. Under warrant marshal seized goods in possession of D. & O. under claim of title by purchase from employees of bankrupt. Goods were delivered to assignee and sold. D. & O. sued marshal and recovered judgment. Price paid by parties who held goods came to C. & Co., to whom bankrupt was indebted under circumstances tending to show that C. & Co. and L. had conspired to effect fraudulent sale for purpose of using proceeds to pay debt of bankrupts to C. & Co. *Held*, that although transaction might be fraudulent as to creditors and assignee, bill for accounting and payment of proceeds would not lie against C. & Co., L. and D. & O., as assignee showed no legal injury to him by fraud, his possession for benefit of estate being undisputed. *Smith, Ass., v. Claffin et al.*, 19 N. B. R. 523; Fed. Cas. 13,026.

156. Where a claim to property in the hands of the assignee is set up and the assignee denies the validity of the claim and asserts title to be in himself, as property of the bankrupt, *held*, that the claimant could not proceed by a summary petition. *Hurst v. Teft, Ass.*, 13 N. B. R. 108; 12 Blatchf. 217; Fed. Cas. 6,939.

157. Where a party lays claim to a certain fund, the possession of the depository is his possession, provided his claim is just and

legal, and the assignee, in order to get possession and control, must proceed by a suit at law or in equity, as provided in the third clause of the second section of the act of 1867. *Smith v. Mason*, 6 N. B. R. 1; 14 Wall. 419.

158. Property transferred by a bankrupt to a creditor within four months preceding adjudication cannot be recovered by the assignee in the absence of proof that a preference or fraud on the act was intended. *Wadsworth, Ass., v. Tyler*, 2 N. B. R. 101; 2 Amer. Law T. Rep. Bankr. 28; 1 Chi. Leg. News, 139; Fed. Cas. 17,032.

### (k). *Trust Property.*

See EQUITY, 11.

159. No property or choses in action held by a bankrupt in a fiduciary capacity passes to the assignee. In re Bank of Madison, 9 N. B. R. 184; 5 Biss. 515; Fed. Cas. 890.

160. If an appointor should exercise a power of appointment, even for the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity for his debts. *Jones, Ass., v. Clifton*, 18 N. B. R. 125; 17 Amer. Law Reg. (N. S.) 718; 6 Reporter, 324; 7 Cent. Law J. 89; Fed. Cas. 7,457.

161. A power of appointment vested in one who, until the execution of the power, has the title to the property, does not pass to an assignee of the person in whom the power resides. *Grandies v. Cochrane*, 112 U. S. 344.

162. Property held in trust merely, by a bankrupt, does not pass to his assignee, but if he has an interest, or if his trust be coupled with an interest, the assignee in bankruptcy is vested with such interest. *Walker, Ass., v. Seigel & Bott et al.*, 12 N. B. R. 394; 2 Cent. Law J. 508; Fed. Cas. 17,085.

163. Where a sum is deposited in trust, the income of which is to be applied to the support of *cestui que trust* and his wife, and for the maintenance and education of their children, the annuity and principal sum being declared to be inalienable by the grantees, and not subject to their debts or control, such income does not pass to an assignee in bankruptcy, nor can the court decree an aliquot part to the assignee. *Durant, Ass., v. Massachusetts Hospital Life Ins. Co.*, 16 N. B. R. 324; 2 Lowell, 575; Fed. Cas. 4,183.

### III. BANKRUPTS.

#### (a) *Bankrupt's Title in General.*

164. Action was commenced to recover personal property wrongfully taken and detained, after which defendant was adjudged a bankrupt. *Held*, the decree adjudging a man a bankrupt does not have the effect of depriving him of the title to his property. *Sutherland v. Davis*, 10 N. B. R. 424.

165. The title to property remains in the bankrupt until the trustee or assignee is duly appointed and qualified and the conveyance or assignment has been made to him. *Id.*

166. Under the act of 1867, in voluntary petitions in bankruptcy, the right of the bankrupt to the disposition of his property ceases on the filing of the petition, and in involuntary petitions such right ceases upon the adjudication. In re Dillard, 9 N. B. R. 8; 2 Hughes, 190; Fed. Cas. 8,912.

167. Prior to the assignment authorized and directed by the bankrupt act, the title of the estate belonging to the debtor, both real and personal, remains unchanged, except that the debtor or any other person may be restrained from disposing of it. *Hampton et al. v. Rouse*, 11 N. B. R. 472; 18 Wall. 187.

168. Bankrupt occupied premises until conveyance was made by assignee to purchaser. After purchaser had perfected title it was agreed that the bankrupt should vacate on subsequently specified day. This he did not do. On petition by assignee for delivery of possession, *held*, that bankrupt was holding as tenant under purchaser and not under assignee. In re Hale, 19 N. B. R. 330; Fed. Cas. 5,912.

169. Until an assignee is appointed the legal title to the assets is in the bankrupt, and it is the duty of the bankrupt to bring suit for the protection and preservation of the property. *Lansing v. Manton*, 14 N. B. R. 127; 3 N. Y. Wkly. Dig. 112; Fed. Cas. 8,077.

170. Where the subject-matter of an action commenced by a bankrupt before bankruptcy does not pass to the assignee, the former has the right to prosecute it without interference from the latter. *Towle v. Davenport*, 16 N. B. R. 478.

171. The bankrupt act does not forbid one, knowing himself to be insolvent, exchanging or selling his property or otherwise disposing

of it at any time previous to the filing of the petition, provided such disposition leaves his estate in as good condition as formerly. *Cook et al. v. Tullis*, 9 N. B. R. 433; 18 Wall. 332.

172. Six months after the discharge of a bankrupt his assets were sold by the assignee, the purchaser afterwards selling them to the bankrupt. *Held*, that the bankrupt was entitled to use funds acquired subsequent to his discharge in the purchase of his own assets. *Phelps, Ass., v. McDonald et al.*, 16 N. B. R. 217.

173. Debtor was arrested under a warrant issued pursuant to the provisions of a state law for fraudulently conveying his property prior to the passage of the bankrupt act. Defendant moved to quash the warrant on the ground that, before it was issued, he had applied for a discharge under the bankrupt law, proceedings on which were then pending. *Held*, that the title to the property fraudulently conveyed should be regarded as vested in the assignee and the motion to quash granted. *Goodwin v. Sharkey*, 3 N. B. R. 138.

#### (b) *Exemptions.*

See EXEMPTIONS, 10, 70.

174. A husband has a right to invest the value of a homestead interest into premises to which others hold the legal title, or into an undivided part interest in land. *Johnson, Ass., v. May et al.*, 16 N. B. R. 425; Fed. Cas. 7,397.

175. When an equity of redemption in property is worth more than the exemption allowed by law, the assignee may sell the property and pay the bankrupt the amount of the exemption, unless the situation of the property is such that a homestead can be set apart without injury to the rest of the estate. *In re Poleman*, 9 N. B. R. 376; 5 Biss. 526; Fed. Cas. 11,247.

176. Suit was brought by a bankrupt on a promissory note assigned to him as part of his exemption. *Held*, that the title to the note was in the plaintiff and he could bring the suit. *Henley v. Lanier*, 15 N. B. R. 280.

177. Moneys arising from sale, *pendente lite*, of property attached, represent the property. Moneys arising from sale of household furniture, sold under process of attachment, belong to the bankrupt. *In re Ellis*, 1 N. B. R. 154; Fed. Cas. 4,400.

#### (c) *Assets, Funds, Payments, etc.*

See COMPOSITION, 32, 46, 147, 149.

178. A debtor, against whom a petition in bankruptcy was filed, had represented to his creditors just previously that he held certain notes. He afterwards swore that he had sold them and spent the money before the injunction was served on him. The evidence indicated that he was endeavoring to defraud the creditors. *Held*, that he must pay over the money or be in contempt. *In re Kempner*, 6 N. B. R. 521; Fed. Cas. 7,689.

179. It is contempt for an involuntary bankrupt to refuse or neglect to pay to the assignee a sum returned in his inventory of effects as "cash on hand." *In re Dresser*, 8 N. B. R. 188; Fed. Cas. 4,077.

180. A conveyance of lands for the purpose of protecting the same from sale for the benefit of creditors of the grantor is valid as between the grantor and grantee, and vests a valid title and estate thereto in the vendee which would pass to his assignee in bankruptcy, and a failure to include the same in the schedules constitutes a concealment thereof. *In re O'Bannon*, 2 N. B. R. 6; Fed. Cas. 10,394.

181. Debtors upon filing their petition and being adjudicated bankrupts must surrender all the assets to the register, notwithstanding there may be a prospect of settlement with their creditors. *In re Shafer et al.*, 2 N. B. R. 178; 1 Chi. Leg. News, 326; Fed. Cas. 12,694.

182. Where a debtor who is utterly insolvent, and with no reasonable prospect of being able to pay his debts, fails to apply for the benefits of the act, but passively permits creditors to appropriate all his assets to pay their debts, his assignee can recover said moneys. *Hyde v. Corrigan*, 9 N. B. R. 406; Fed. Cas. 6,968.

183. A bankrupt failed to schedule a judgment among his assets, because "it had never occurred to him to place it there," and because he considered it worthless. *Held*, not to constitute false swearing. *In re Winsor*, 16 N. B. R. 152; 9 Chi. Leg. News, 402; 2 Cin. Law Bul. 212; Fed. Cas. 17,885.

184. Assets "means all the property of every name, kind and nature chargeable with debts of the bankrupt that come into

the hands of, and under the control of, the assignee in bankruptcy by reason of the said property having ever been owned by and in the possession of the said bankrupt." In re Taggart, 16 N. B. R. 351; Fed. Cas. 18,725.

185. The word "assets," as used in section 33, means money received by the assignee, and not the appraised value of the estate which may come into his hands (1867). In re Van Riper, 6 N. B. R. 573; Fed. Cas. 16,874.

186. The term "assets," in section 33 of the act of 1867 and the amendment of 1868, means gross assets, and not the sum left for distribution after deducting costs and expenses. In re Kahley, 6 N. B. R. 189; 3 Biss. 169; 4 Chi. Leg. News, 121; 5 Amer. Law T. Rep. 175; Fed. Cas. 7,594.

187. A bankrupt had charge of and conducted in his own name the business of another, taking half of the net profits as his compensation. It was held that his right to the net profits was not property to be reported as assets. In re Beardsley, 1 N. B. R. 121; 1 Amer. Law T. Rep. Bankr. 94; Fed. Cas. 1,184.

188. Payments made to a debtor after a petition in bankruptcy has been filed, with a view of defeating the bankrupt act in any of its essential requirements, are void, and the person by whom such payments are made can be held to answer for the original demand of the assignee, whose title relates back to the date of the commencement of proceedings in bankruptcy. Babbitt v. Burgess, 7 N. B. R. 561; 2 Dill 169; 5 Chi. Leg. News, 326; Fed. Cas. 693.

189. A petition was filed to compel a bankrupt to pay to the assignee certain moneys alleged to have been collected by him just before and just after the filing of the petition in bankruptcy. Held, that he would be compelled to pay such moneys to the assignee. In re Ettinger, 18 N. B. R. 222; Fed. Cas. 4,543.

190. Assignee of a voluntary bankrupt paid out the greater portion of the assets which came into his hands to judgment creditors who had perfected judgment and issued execution before the petition in bankruptcy was filed. On application for discharge, held, that the money so paid out should be included in the computation to ascertain what per cent. the assets were of the gross indebtedness. In re Taggart, 16 N. B. R. 351; Fed. Cas. 18,725.

191. Payments to creditors who have recovered judgment and issued execution before the commencement of proceedings in bankruptcy are to be included in the assets of a voluntary bankrupt, in the computation to determine the per cent. of assets. Id.

192. Where limitation has ceased and division made of estate, the bankrupt taking his share in fee, such land is liable to bankrupt's debts, though contrary to stipulation in instrument by which he takes it. In re Myrick, 3 N. B. R. 38; Fed. Cas. 10,000.

#### (d) *Purchasers and Third Parties.*

193. Goods purchased of a person who becomes insolvent belong to the purchaser if he have no knowledge of the insolvency of the seller and such transaction is not in the nature of a preference. Brooke, Ass., v. Scrogins, 11 N. B. R. 259; Fed. Cas. 1,936.

194. A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same has been paid. Sawyer et al. v. Turpin et al., 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

195. Where a bankrupt agreed to build an engine and afterward notified the intending purchasers that it had been completed and forwarded, whereupon they paid for it, the fact being that the engine did not exist, but one was afterward built and in the possession of the bankrupt at the time of the bankruptcy, title thereto passes to the purchasers by estoppel. Rockford v. Rock Island Co., 3 N. B. R. 50 (8 vo. ed.); 1 Lowell, 345; Fed. Cas. 11,978.

196. Title to land was claimed by the plaintiff, as part of the assets of a bankrupt sold to the plaintiff's grantor. The defendants claimed title under a quitclaim deed executed by the bankrupt, and contended that they had no actual notice of the plaintiff's title, as the deed of the register in bankruptcy to the assignee had not been duly acknowledged and recorded. Judgment was rendered for plaintiff, and was affirmed on appeal. Brady v. Otis et al., 14 N. B. R. 345.

197. Although an assignment be not duly acknowledged or recorded, yet it is valid, as against a party who takes title from the bankrupt, after the commencement of the proceedings in bankruptcy, with full notice thereof. Id.



198. Bankrupt purchased hides with money furnished by claimant under an agreement by which the hides were to be manufactured into leather by the former for the latter, the money being remitted by draft, and a portion of the hides, concerning which the litigation arose, was purchased with the proceeds of drafts which the claimant refused to accept. *Held*, that the title to the goods was in the claimant. *Safford et al. v. Burgess, Ass.*, 16 N. B. R. 402; Fed. Cas. 12,213.

199. It is not necessary, in the purchase of goods by an agent, that he give in payment for them the identical money received from the principal, in order to vest the title in the latter. *Id.*

200. Agent purchased goods for his principal, paying for them by checks on his general bank account. Principal remitted by drafts, which agent deposited in bank and had credited to his general account. *Held*, that the title to the goods was in the principal. *Id.*

201. A second purchaser, who had knowledge of the bankrupt's failure, and that the seller held the goods under mortgage from the bankrupt, does not get a good title. To constitute a *bona fide* purchaser for value, he must not only show that he had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities. *Reeson v. Knapp*, 4 N. B. R. 114; 1 Dill. 186; Fed. Cas. 11,861.

202. When informed of sufficient facts to put a prudent man on inquiry, a second purchaser takes the risk of the title of the first. *Walbrun et al. v. Babbitt, Ass.*, 9 N. B. R. 1; 16 Wall. 577.

#### (e) *Ultimate Title of Bankrupt.*

203. After satisfying valid claims the estate of the bankrupt belongs to him, and a conveyance to him alleged to be fraudulent against creditors will not be set aside at suit of the assignee, if it appears that no debts exist that are provable against the estate. *Nicholas, Ass. v. Murray*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,228.

204. Amounts remaining in the hands of the assignee, after discharge of a bankrupt against whose estate no debts were proved, and there is reasonable cause to believe none

will be proved, will, upon proper petition, be paid to the bankrupt. *In re Hoyt*, 8 N. B. R. 18; Fed. Cas. 6,806.

205. Where A. & B. conveyed part of their land to C., reserving the use of an alley so long as they should "continue to own" the part retained, *held*, that proceedings in bankruptcy, which were afterwards arranged, and the property reconveyed to A. & B. by the assignee, did not terminate A.'s ownership of the land in the sense meant by said reservation, and consequently A.'s right to the use of said alley is not lost thereby. *Colie v. Jamison*, 13 N. B. R. 1.

206. After appointment of an assignee, and he had entered on his duties, a composition was accepted and confirmed. Assignee called a meeting of creditors and gave notice that he would apply for a settlement of his account and discharge from liability. *Held*, that upon confirmation of composition creditors ceased to have any interest in estate, and it became duty of assignee to pay balance in his hands to bankrupts. *In re August et al.*, 19 N. B. R. 161; Fed. Cas. 645.

#### IV. CORPORATIONS.

See CORPORATIONS, 32.

207. An assignee of corporate stock who has caused it to be transferred to himself on the books of the company and holds it as collateral security for a debt due from his assignor is liable for unpaid balances therein to the company, or to the creditors of the company after it has become bankrupt. *Pullman v. Upton, Ass. etc.*, 17 N. B. R. 489; 96 U. S. 328.

208. The assignee of one creditor of a corporation cannot maintain an action against one stockholder to recover the full amount of his debt, without regard to the other creditors or the ability of the other stockholders to respond, where the charter provides that stockholders are "bound respectively for all the debts of the bank in proportion to their stock holden therein." *Pollard v. Bailey, Ass.*, 11 N. B. R. 276; 20 Wall. 520.

209. Stockholders are liable in bankruptcy to the assignee for their respective amounts unpaid on their stock. *Wilbur, Ass. v. Stockholders*, 18 N. B. R. 178; 13 Phila. 479; 85 Leg. Int. 346; 26 Pittsb. Leg. J. 15; Fed. Cas. 17,686.

210. The assignee of a bankrupt company is entitled to recover against a transferee of stock, but not where the transferee does not accept the stock. *Id.*

211. Twenty bonds were held by a bailee, in escrow, for a corporation which became bankrupt after having sold, and received payment for six of the bonds. The assignee claimed the bonds as against the vendee. *Held* that, the bonds being all alike, the vendee was entitled to them. *Hamilton, Ass., v. Bank*, 18 N. B. R. 97; 3 Dill 230; *Fed. Cas.* 5,987.

### V. CLAIMS AGAINST THE GOVERNMENT.

212. A claim against the government for property of a bankrupt destroyed "during the war" will pass to his assignee. *Phelps, Ass., v. McDonald et al.*, 16 N. B. R. 217.

213. A claim against the United States in favor of a British subject residing in this country passes to his assignee in bankruptcy. *Id.*

214. Claims for unlawful seizure of property by a foreign government pass to the assignee. *Clark v. Clark*, 17 How. 315.

215. E, a bankrupt, had a claim against the United States for cotton seized by the military forces of the United States during the war of the rebellion. *Held*, that the act of congress of February 26, 1853, relating to assignment of demands against the government, did not embrace a transfer of title by operation of law. *Erwin v. United States*, 19 N. B. R. 172; 97 U. S. 892.

216. E had a claim against the United States for cotton seized by military forces of United States during war of rebellion. Upon E becoming bankrupt, *held*, that such claim passed to the assignee in bankruptcy. *Id.*

217. Bankrupt included in his schedule of assets a claim against the government for cotton destroyed during the war. *Held*, that the claim passed to the assignee. *Phelps, Ass., v. McDonald et al.*, 16 N. B. R. 217.

218. One item in a schedule of assets was: "Claim against Gen. Osborne of the U. S. A. and others, for burning, in Jan. and Feb. 1865, from 1,000 to 2,000 bales of my cotton in Ark. and La." *Held* to be a statement that the claim was against the government. *Id.*

219. A bankrupt, a British subject, held a claim against the United States for cotton burned during the war, which was marked on his schedule as worthless, and was sold for \$20 to W., who purchased it at request of and with money furnished by the bankrupt. *Held*, that the claim passed to assignee. *Phelps, Ass. etc., v. McDonald et al.*, 19 N. B. R. 187; 99 U. S. 298.

### VI. INSURANCE.

220. An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability by the usual transfer of the policy to the register in charge of the bankruptcy proceedings until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. *In re Carow*, 4 N. B. R. 178; 41 How. Pr. 112; *Fed. Cas.* 2,426.

221. Where a bankrupt was at time of adjudication the owner of a dwelling covered by a policy of insurance providing that "if the title to the property is transferred or changed this policy shall be void," and "if without the written consent of the company this policy be assigned it shall be void," and the building was destroyed by fire after the transfer to the assignee, *held*, that such transfer being by operation of law did not avoid the policy, and that the assignee is entitled to recover the insurance money. *Starkweather v. Cleveland Ins. Co.*, 4 N. B. R. 110; 8 Chi. Leg. News, 77; 28 Leg. Int. 36; 10 Amer. Law Reg. (N. S.) 333; 5 Amer. Law Rev. 568; *Fed. Cas.* 13,308.

222. An underwriter entitled to a right of compensation under an abandonment becoming bankrupt, this right passes to his assignee under the law. *Comegys v. Vasse*, 1 Wheat. 193.

### VII. MONEY (FUNDS).

223. Proceedings to attach funds in hands of assignee. *Held*, that such funds were not subject to garnishment. *In re Cunningham*, 19 N. B. R. 276; 20 Alb. Law J. 257; *Fed. Cas.* 3,478.

224. Funds in the hands of an assignee

are liable to taxation by the state. In re Mitchell, 16 N. B. R. 536; 17 Alb. Law J. 26; Fed. Cas. 9,658.

225. Where a surplus fund remains in the hands of the state court that is claimed by judgment liens antedating the commencement of proceedings in bankruptcy, the good faith or validity of which are proven, the fund will be distributed to them, and not turned over to the assignee in bankruptcy. Biddle's Appeal, 9 N. B. R. 144.

226. A debtor who pays the money under an order of his creditor to a third party, with the intent thereby to enable his creditor to give a preference to such third party, will be deemed to still hold it, and the assignee may sue him for its recovery. Fox et al. v. Gardner, 12 N. B. R. 137; 21 Wall. 475.

227. On petition of creditors to compel bankrupt to pay certain moneys to assignee, *held*, that all money and property in hands of bankrupt at time of filing petition, which he is using and holding as his own, passes to assignee, and he cannot set up in defense to claim of assignee title in third person merely to hold it himself. In re Moses, 19 N. B. R. 412; Fed. Cas. 9,870.

228. A trustee under a private assignment had received a certain amount, which he deposited with his own money in his own name. Finding himself insolvent, he withdrew the money and deposited it as trustee. Two months afterwards he was adjudged bankrupt. The assignee petitioned to have the money declared to be assets for the general creditors. The motion was denied, a prescribed mode of settlement being ordered. *Ex parte* Hobbs, 14 N. B. R. 495; 2 Lowell, 491; Fed. Cas. 6,549.

229. The title to the money in the bank, upon the presentation of a check by the payee thereof, is superior to the banker's lien for maturing paper, and will pass to and may be enforced by the assignee in bankruptcy of the payee. Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids, Mich., 10 N. B. R. 44.

230. W. bought of a banker, afterward bankrupt, a check on his New York bank. The check was not presented for payment until after bankruptcy of the drawer, when payment was refused. *Held*, that the funds in the New York bank passed to the assignee

of the bankrupt and W. was not entitled to priority of payment. In re Smith, 15 N. B. R. 459; 2 Cin. Law Bul. 119; Fed. Cas. 12,990.

231. A firm, having a deposit in a bank, were adjudicated bankrupts. Subsequently a creditor recovered judgment against them and procured an order restraining the bank from making any disposition of any property belonging to the bankrupts. The assignee sued the bank, and the court held that the petition in bankruptcy having been filed before the judgment was obtained the assignee could recover. Morris, Ass., v. First Nat. Bank of N. Y., 15 N. B. R. 281.

232. Where a firm which is insolvent makes a loan through an agent *after* their failure, and the lender, immediately after learning of the failure, makes effort to reclaim the package of notes in the agent's hands, and before the money reaches the firm title to it is disclaimed by a member of the firm and by him placed in a bank to the credit of the lender, the title to money does not pass from the lender, nor is the assignee of such firm entitled to recover it from the bank. Purviance v. Union National Bank, 8 N. B. R. 447; 30 Leg. Int. 352; 21 Pittsb. Leg. J. 33; Fed. Cas. 11,475.

233. A. deposited money in bank and immediately drew a check against it in payment of a draft for the amount drawn by the bank on New York. The banker knew that for ten days the New York bank had refused to honor his drafts, and at the time he received the money he was arranging an assignment for the benefit of his creditors. *Held*, that the title to the money passed to the bank and that A. was only entitled to share *pro rata* with the other creditors. In re King, 8 N. B. R. 285.

234. Assignees of a bankrupt brought an action against a bank to recover a sum alleged to have been in possession of the bank at the date of the adjudication. Said sum, in pursuance of an agreement between the bank and the bankrupt previous to adjudication, had been carried by the bank to a special account as security against bills, not yet at maturity, drawn by the bankrupt and discounted by the bank. *Held*, that the action failed, since by the contract the sum claimed formed no part of the bankrupt's estate, but was rightly in possession of the

bank at the time of the action. *Chartered Bank of India v. Evans et al. (Eng.)*, 4 N. B. R. 46.

235. Where A. and B. placed with D. money to be invested in trust for their benefit, and D. failed to invest it but used it in speculations, afterwards becoming bankrupt, and A. and B. petitioned to have the assignee ordered to refund the money, *held*, that while no trust property is allowed to pass from the bankrupt to the assignee, it must be property that can be followed or distinguished; and where the property does not remain *in specie*, but has been made way with by the trustee, the *cestuis que trust* must come *in pari passu* with the other creditors and prove against the trustee's estate for the amount due them. *In re Fane-way*, 4 N. B. R. 26.

236. The sheriff, having made a levy and sale of the property of the bankrupt after the title has passed to the assignee, deposited the proceeds with the *judgment creditor* (a bank) and received a *certificate of deposit* instead of a *receipt*. *Held*, bank liable to the assignee for the amount. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

237. Where an assignee has received money from the bankrupt, or as the latter's right, it is subject to every equity to which it was subject in the bankrupt's hands; but where he has recovered it in spite of the bankrupt's efforts to part with it, it will be free for distribution among the creditors generally. *White v. Jones*, 6 N. B. R. 175; 29 Leg. Int. 825; Fed. Cas. 17,550.

### VIII. PARTNERSHIPS.

See PARTNERS, VII, IX, XII, 57, 58, 77-79, 98-103, 126; CLAIMS, 126.

238. The bankrupt law provides that in case members of partnerships are declared bankrupts, the estates of the individual members, as well as the partnership estate, must be settled in the bankrupt court. *Atkinson v. Kellogg*, 10 N. B. R. 535; 7 Chi. Leg. News, 9; Fed. Cas. 613.

239. To determine the respective rights of an assignee and third parties in real estate purchased by a bankrupt, and such parties under an agreement to furnish the outlay and share in the profit and loss equally,

the partnership transactions up to the institution of proceedings in bankruptcy should be adjusted, and the exact interest of the bankrupt and each of his partners be ascertained. *Thrall v. Crampton, Ass. etc.*, 16 N. B. R. 261; 9 Ben. 218; Fed. Cas. 14,008.

240. An assignee of a bankrupt firm takes by the assignment all the property of the firm and of the individual members thereof, even though part of the property may be out of the district in which the bankrupts reside, and owned in part by the partners not joined in bankruptcy proceedings. *In re Leland*, 5 N. B. R. 222; 5 Ben. 168; Fed. Cas. 8,228.

241. Under a separate commission of bankruptcy against one partner only, his interest in the joint funds and private property passed to the assignee, and this interest is subject to the claim of the copartners (act of 1800). *Harrison v. Sterry*, 5 Cranch, 289.

242. An assignee in bankruptcy of an individual partner cannot recover property transferred by a retiring partner to the bankrupt and by him assigned to a third person. *In re Shepard*, 3 N. B. R. 42; 3 Ben. 347; Fed. Cas. 12,754.

243. Where a member of a firm builds a house on property belonging to him individually, with material belonging to the firm, which is indebted to him, the house is a part of the realty and does not pass to the assignee in bankruptcy of the firm to any greater extent than for any excess in value over the exemption allowed by law to the copartnership. *In re Parks and Parks*, 9 N. B. R. 270; Fed. Cas. 10,765.

244. Where a firm is dissolved, and one member retains the stock and continues business, adding new stock, so that the entire stock cannot be distinguished, and both former partners are adjudged bankrupts, and the assignee of the one continuing business takes possession of the entire stock and sells the same, such assets must be regarded as belonging to such member's individual estate, and liable first to his individual debts and then to the partnership debts. *In re Montgomery*, 3 N. B. R. 429 (8 vo. ed.); 3 Ben. 565; Fed. Cas. 9,727.

245. In a schedule of assets, real estate held by members of a firm as tenants in common was classified as partnership assets. *Held*, that such classification did not convert

the separate property of the individual partners into firm property. In re Zug, 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 84 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

246. In bankruptcy, joint and separate estates are considered as distinct estates. A joint creditor, having security on the separate estate, may prove against the joint estate without relinquishing his security, may prove his whole claim against both estates and receive a dividend for each, but so as not to receive more than the full amount of his debt from both sources. In re Howard et al., 4 N. B. R. 185; Fed. Cas. 6,750.

247. By "separate estate," in the meaning of the bankrupt act, is meant that property in which each partner is separately interested to the exclusion of other partners at the time of the bankruptcy. In re Lowe and Richards, 11 N. B. R. 221; Fed. Cas. 8,564.

248. Where a surviving partner is adjudged a bankrupt, as such and as an individual, his assignee is entitled to the partnership assets. In re Temple, 17 N. B. R. 845; 4 Sawy. 92; Fed. Cas. 13,825.

249. A bankrupt partner's share in the joint estate will vest in the assignee though the firm is not declared bankrupt. Wilkins v. Davis, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

250. Pending proceedings to declare A. and B. individually and as a firm bankrupts, defendant acquired by purchase under different executions the separate interests of both partners in the firm. Held, that he only acquired an interest in such assets as remained after the firm's partnership debts were paid. Osborne v. McBride, 16 N. B. R. 22; 8 Sawy. 590; Fed. Cas. 10,593.

251. One member of a firm withdrew moneys therefrom for his private purposes, but such withdrawal was not fraudulent as against his copartners. Held, that the assignee of the firm cannot prove therefor against the separate estate of such partner, even if firm estate was known to be insolvent at the time, and withdrawal was made with knowledge of insolvency. In re May et al., 19 N. B. R. 101; Fed. Cas. 9,328.

252. Bankrupt was the general partner of a limited partnership, the capital of which was furnished by a special partner, who received seventy-five per cent. of the profits, and contracted to bear the losses in the same

proportion. The contract also provided that the special partner should lose no more than his capital, and interest thereon, and the amount of profits received by him. Assignee in bankruptcy sued him to recover the amount of profits received by him. Held, that the assignee could recover. Wilkins v. Davis, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

253. The partnership property of A. & B. was divided, each agreeing to pay the firm debts applicable to the property he took. A. sold an interest to C. The firm of A. & C. contracted debts and became bankrupt, before which certain property of A. & C. was attached for a debt due by the firm of A. & B. on the property taken by A. Held, that the assignee of A. & C. had a right to the property attached, that it should be sold, paying first the creditors of the firm of A. & C. Whatever surplus A. should be entitled to should be subject to attachment. Crane, Ass. etc., v. Morrison et al., 17 N. B. R. 393; 4 Sawy. 138; Fed. Cas. 3,355.

254. Certain partnership real estate was conveyed to A., one of the partners, individually, and was used in carrying on the firm business, and while being so used A. conveyed to the remaining partner, his heirs and assigns, one-fifth part of it. Both deeds were recorded. On sale by assignee in bankruptcy, held, that the partners were tenants in common in proportion to their shares, and that the proceeds of the sale were assets of the individual members of the firm. In re Zug et al., 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 84 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

255. An assignee of a firm may recover property transferred by one partner in violation of the bankrupt act. The amendment of June 22, 1874, does not affect the rights of the assignee where the adjudication was made before that time. An assignment by one partner of his individual estate for the equal benefit of his individual creditors first, and the excess, if any, to be paid to his partnership creditors, falls under section 5120 of the Revised Statutes and may be set aside at any time within six months. Barnewell & Gaynor, Ass., v. Jones, Dunn & Crawford, 14 N. B. R. 278; Fed. Cas. 1,027.

256. E. conveyed property in fraud of creditors, and afterwards creditors of firm

of E. & C. obtained judgments against said firm and docketed them; then firm and members were adjudged bankrupts and assignee brought suit against grantee in fraudulent conveyance to have same set aside and obtained decree, whereupon property was sold by assignee, free from liens, and proceeds brought into court. *Held*, that lien of judgments did not attach, and proceeds are separate estate of E, and must be first equally applied to payment of his separate creditors. *In re Estes & Carter*, 19 N. B. R. 430; Fed. Cas. 4,536.

### IX. PREFERENCES.

See PREFERENCES, 81, 93.

257. Where an arrangement exists between two banks by which one acts as the agent of the other for clearing-house purposes, the payment by the former to the latter on the day of the former's failure of the amount of the latter's deposits is a preference, and the amount so paid may be recovered by the assignee in bankruptcy of the insolvent bank. *Phelan, Ass. etc., v. Iron Mountain Bank*, 16 N. B. R. 308; 4 Dill. 88; 5 Cent. Law J. 351; Fed. Cas. 11,069.

258. The assignee in bankruptcy of two members of a firm consisting of three co-partners cannot recover a preference given by the firm to a firm creditor. *Withrow v. Fowler*, 7 N. B. R. 339; Pac. Law Rep. 102; 6 Alb. Law J. 422; Fed. Cas. 17,919.

259. A bankrupt who, within four months of the filing of a petition in bankruptcy, allows his property to be seized on execution by a creditor who has reasonable cause to believe his debtor is insolvent, gives an illegal preference to such creditor, and the value of the property so seized can be recovered from the creditor by the assignee. *Christman v. Haynes*, 8 N. B. R. 528; Fed. Cas. 2,703.

260. Six months and two days prior to filing a petition for voluntary bankruptcy, a debtor made an assignment of all his property to an alleged creditor with a view of giving him a preference, the alleged creditor knowing the debtor to be insolvent and that a fraud was intended. *Held*, that the assignee should recover the amount of the property so transferred from the transferee. *Hyde v. Sontag & Eldridge*, 8 N. B. R. 225; 1 Sawy. 249; Fed. Cas. 6,974.

261. Where a bankrupt has allowed his property to be taken on legal process, with intent to give a preference, the assignee should resort to suit at law or bill in equity to obtain possession, and not proceed by summary petition and order to show cause. *In re Ballou*, 3 N. B. R. 177; 4 Ben. 135; Fed. Cas. 818.

262. A debtor, to obtain an extension of time, executed to his creditor a chattel mortgage of nearly all his property. On failure to receive payment, creditor took possession and sold the property, and subsequently debtor filed a petition and was adjudged a bankrupt. *Held*, that the mortgage was void, being a preference, and that the assignee was entitled to recover from the mortgagee the value of the property taken and sold. *In re Driggs, Ass., v. Moore, Foote & Co.*, 3 N. B. R. 149; 1 Abb. U. S. 440; Fed. Cas. 4,083.

263. An insolvent debtor, who gives his note with a warrant of attorney to confess judgment thereon to a creditor, gives a preference to such creditor, whether it is so intended or not; and, if the creditor has reasonable cause to believe the debtor insolvent, and, on a judgment entered, causes property of the debtor to be sold and receives the proceeds, he is liable to the assignee for the amount received. *Campbell, Ass., v. Traders' Nat. Bank*, 3 N. B. R. 124; 2 Chi. Leg. News, 148; 1 Md. Law Rep. 169; 2 Biss. 423; Fed. Cas. 2,370.

264. A creditor who claims a preference which is contested by others is not eligible to be named as one of the committee to wind up the affairs. *In re Stuyvesant Bank*, 6 N. B. R. 272; 5 Ben. 506; Fed. Cas. 13,581.

265. An assignee in bankruptcy can recover from a creditor the value of goods and notes transferred to him by the debtor within six weeks of the filing of a petition. *North v. House*, 6 N. B. R. 365; Fed. Cas. 10,310.

266. A transferred property to B. with a view of giving a preference, and B. sold a portion of it to C. A. being adjudged bankrupt, the marshal, under a warrant to seize his property, took possession of that sold by B. to C. On petition by C. for an order returning the property to him, *held*, that the marshal had authority to take it. *In re Briggs*, 3 N. B. R. 157; 2 Chi. Leg. News, 218; Fed. Cas. 1,869.

## X. PROCEEDS.

267. A sheriff seized, on mesne attachment, and sold as perishable, the property of a bankrupt, within four months prior to commencement of proceedings in bankruptcy, and thereafter paid the money to the execution creditor in satisfaction of judgment obtained and execution issued on the debt for the security of which the attachment was issued. *Held*, liable to pay again to assignee in bankruptcy, notwithstanding ignorance, on his part, of bankruptcy proceedings. *Miller v. O'Brien*, 9 N. B. R. 26; 9 Blatchf. 270; 21 Pittsb. Leg. J. 82; Fed. Cas. 9,596.

268. The net proceeds of the sale of the property of a bankrupt on a legal process suffered by the bankrupt will be ordered to be paid by the sheriff to the assignee in bankruptcy, when it appears that the creditor had reasonable cause to believe that the firm was insolvent. *In re Black et al.*, 1 N. B. R. 81; 2 Ben. 196; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 1,457.

269. Assignee in bankruptcy brought an action to recover proceeds under sale of a quantity of lumber, the property of bankrupt, made by defendants, under a chattel mortgage alleged to be fraudulent, in that, by agreement of parties, mortgagor continued in business of selling lumber of said stock, using the proceeds in his business. *Held*, that assignee had a right of action, although none of the creditors has acquired a specific lien. *Southard, Ass. etc., v. Benner et al.*, 19 N. B. R. 124.

270. The proceeds of sale of mortgaged property in the possession of a state court, not brought there by final process to enforce the mortgage lien, must be paid over to the assignee in bankruptcy of the mortgagor, and the mortgagee must go into the bankrupt court and assert his lien there. *Morris v. Davidson*, 11 N. B. R. 454.

271. Where the security of a creditor is reduced to money, the assignee is entitled to any surplus over and above the amount necessary to liquidate the debt. *In re Newland*, 9 N. B. R. 62; 7 Ben. 63; 2 Ins. Law J. 860, 895; 4 Bigelow, Ins. Cas. 283; Fed. Cas. 10,171.

272. The assignee, in a judgment obtained in the federal court on which execution issued and under which the marshal

sold, is entitled to the proceeds of the sale, although that judgment, execution and levy under it were subsequent to a judgment execution and levy of proceeds from a state court. *In re Jordan*, 8 N. B. R. 45; Fed. Cas. 7,518.

273. A consignor whose property was sold prior to the bankruptcy and the proceeds mingled with the general assets has no lien or specific claim against the estate. He can only share it with the other creditors. *In re Coan & Ten Broeke Carriage Mfg. Co.*, 12 N. B. R. 203; 6 Biss. 315; 7 Chi. Leg. News, 260; Fed. Cas. 2,915.

274. Where the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition in bankruptcy, but subsequently fulfills the same, unless the contract for payment was contingent upon full performance of the services, the compensation will be apportioned between the assignee and the bankrupt in proportion to the value of the services rendered before and after bankruptcy. *In re Jones*, 4 N. B. R. 114; Fed. Cas. 7,448.

275. Certain goods were sent from New York to San Francisco by the owners. Three weeks thereafter proceedings in bankruptcy were instituted against said owners, who were adjudged bankrupts. An attachment was issued against the goods and they were sold. The assignee in bankruptcy brought suit in the state court for the recovery of the proceeds, and judgment was rendered for the plaintiff. *Dambmann v. White et al.*, 12 N. B. R. 438.

276. Certain debtors owed numerous creditors, and within four months prior to bankruptcy proceedings a creditor, knowing their condition, prevailed upon them to convey the property to a third person, who paid them, the money being at once turned over to the said creditor in satisfaction of all demands. The debtors were to retain possession and sell the goods on commission. To permit this arrangement, another creditor, the father of the debtors, released his claim. The debtors were then ejected by the third person on writ of replevin. On suit by assignee, *held* he should recover the amount of the goods with interest. On appeal, decree affirmed. *Michaels et al. v. Post, Ass.*, 12 N. B. R. 152; 21 Wall. 398.

## XI. PROPERTY OF THIRD PARTIES.

**277.** Assignees must surrender to owners property found in the possession of the bankrupt, but belonging to others. In re Noakes, 1 N. B. R. 164; Bankr. Ct. Rep. 162; Fed. Cas. 10,281.

**278.** A. bought and paid for certain goods which remained in the hands of the vendor and passed to the assignee when the vendor became bankrupt, upon A.'s petition for the delivery of the goods. *Held*, that as A. paid a full and fair price for the goods, his prayer must be granted. In re Pusey, 7 N. B. R. 45; Fed. Cas. 11,478.

**279.** A debtor, shortly before filing his petition in bankruptcy, purchased a quantity of carpets. The vendor, fearing the debtor did not intend to pay, brought replevin and the sheriff took possession. The bankrupt bonded them back and they came into the hands of the assignee. The parties applied to the register, asking that the goods be held by the assignee to await the determination of ownership. Upon certification it was held that, where the title is in dispute, application must be made to the court by petition, but otherwise the register may dispose of it. In re Graves, 1 N. B. R. 19; 2 Ben. 100; Fed. Cas. 5,709.

**280.** Defendant, a United States marshal, seized goods as the property of L. & O., bankrupts. Said goods had been sold and transferred to plaintiffs before bankruptcy proceedings. Defendant justified under warrant issued under Revised Statutes, section 5024. *Held*, that Revised Statutes, section 5024, which provides for issuing of provisional warrant, relates to property which belongs to bankrupt and such as is in his possession and under his control, and does not embrace property belonging to or in possession of another person, which such person claims to own, or in regard to which a dispute exists, even if it is alleged that such property has been transferred in violation of the act. Doyle et al. v. Sharpe, etc., 19 N. B. R. 144.

## XII. PROPERTY IN WHICH WIFE HAS AN INTEREST.

See MARRIED WOMAN, 21.

**281.** The assignee at law has a right to the chose in action of the wife, and the law reduces it into his possession. The bankrupt

law gives over all that the husband had, or could dispose of, to the assignee. The property is vested by law in them, and the question of survivorship is laid aside by the bankruptcy. In re Boyd, 5 N. B. R. 199; 2 Hughes, 349; Fed. Cas. 1,745.

**282.** The statutory trust of creditors in real estate held by the wife of a debtor, who was subsequently adjudicated a bankrupt, inures as assets to the assignee when said estate was purchased by the bankrupt prior to bankruptcy, and was paid for with his own money in fraud of his creditors. In re Meyers, 1 N. B. R. 162; 2 Ben. 424; Fed. Cas. 9,518.

**283.** If a husband receives money from his wife and invests it in realty in her name, until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee in bankruptcy. Muirhead, Ass. etc., v. Aldridge et al., 14 N. B. R. 249; 2 N. Y. Wkly. Dig. 480; 33 Leg. Int. 213; Fed. Cas. 9,904.

**284.** A conveyance by a partner in a firm, doing a large but failing business, to his wife, of real estate, purchased by the withdrawal of more than a third of the partner's share in the capital, is void, and the assignee in bankruptcy is entitled to the proceeds of such property. Phipps et al. v. Sedgwick, Ass. etc., 16 N. B. R. 64; 95 U. S. 3.

**285.** A husband not being insolvent or in contemplation of bankruptcy allowed his wife to expend the proceeds of two notes belonging to him in the improvement of her separate estate, and afterwards becoming insolvent was adjudicated a bankrupt. *Held*, that his interest thereby acquired in his wife's estate was too remote to pass to his assignee, and he was not guilty of concealment of his estate in failing to report such interest in his schedules. In re Wyatt, 2 N. B. R. 94; 1 Chi. Leg. News, 107; Fed. Cas. 18,106.

**286.** The power of revocation and appointment to other uses reserved to the husband in a deed to his wife for her separate use is not an interest in the property which passes to his assignee, nor does it render void a deed otherwise valid as against the assignee. Jones v. Clifton, 101 U. S. 225.

**287.** In explanation of a deficit in his assets, a bankrupt stated that his wife had money which she kept in the house, and had never been invested, the profits of business



which he alleged she had conducted on her own account; and after bankruptcy, bankrupt had gone into business as the professional agent of his wife. *Held*, that the bankrupt should pay over to the assignee the amount of the deficit. *In re Peltasohn et al.*, 16 N. B. R. 265; 4 Dill. 107; 10 Chi. Leg. News, 9; Fed. Cas. 10,913.

288. Bankrupt, several years before bankruptcy and when solvent, procured conveyance of real estate to be made to wife. Within four months preceding bankruptcy, husband and wife conveyed to creditor of latter, and consideration was credited on debt due grantee from husband. *Held*, that property was not subject to general debts of bankrupt. *Stewart v. Platt, Ass. etc.*, 19 N. B. R. 347; 101 U. S. 731.

289. Real estate was conveyed to A. and his wife to be held in entirety. A.'s wife obtained a decree in divorce pending proceedings in bankruptcy. *Held*, that if the effect of the divorce was to transform the tenancy to a tenancy in common, A.'s interest was a new acquisition which could not be claimed by his assignee. *In re Benson*, 16 N. B. R. 377; 8 Biss. 116; Fed. Cas. 1,328.

290. Where there has been no consummated conversion by the bankrupt of his wife's separate estate, the assignee cannot get the legal title without coming into a competent court and obtaining a decree for its conveyance to him; and such court will then decree according to the equity of the case. The same rule applies where the conversion has been consummated by fraud. *In re Campbell*, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

291. Assignee applied to court to have property of R.'s wife delivered to him as assignee of R., who is bankrupt and hopelessly insolvent, attempting to show, but submitting no proof, that she held the property in her name as cloak over and against her husband's creditors. Application denied. *In re Driggs, Ass., v. Russell and Russell*, 3 N. B. R. 39; 1 Chi. Leg. News, 353; 2 Amer. Law T. 206; 1 Amer. Law T. Rep. Bankr. 160; Fed. Cas. 4,084.

292. A gift by a bankrupt to his wife before adjudication and not in contemplation of insolvency, of funds which were used in improving the separate estate of the wife,

does not vest him with such an interest therein as would pass to his assignee and need not be set forth in his schedules. *In re Wyatt*, 2 N. B. R. 94; 1 Chi. Leg. News, 107; Fed. Cas. 18,106.

293. Under the laws of Michigan of 1844, if a married woman consent to the purchase of property by her husband in his name, with means earned by herself after marriage, she cannot thereafter reclaim the property as against his creditors, whose debts accrued while the property was held by him. *Keating v. Keefer*, 5 N. B. R. 133; 4 Amer. Law T. 162; 1 Amer. Law T. Rep. Bankr. 266; Fed. Cas. 7,635.

294. A wife executed a mortgage on her realty to secure a loan. The money was used by her husband to pay his debts, and the amount used exceeded the amount he would be entitled to by the curtesy. Afterward husband and wife united in a general assignment of all the husband's property, but expressly reserving that of the wife. The wife died and her realty was sold and a sum realized greater than the incumbrances. The assignees claimed the residue as the husband's curtesy. *Held*, that the heirs or representatives of the wife were entitled to the fund. *Shippen and Robbins' Appeal*, 15 N. B. R. 553.

295. A settlement of a large amount of property upon his wife was made by a member of a firm whose nominal assets exceeded the liabilities by two-ninths. The firm dissolved and the settler and another member formed a new copartnership and continued the business, furnishing no new capital. They failed two years later. The executor sold the property and lost the money in a business transaction. The assignee sought to reach the property. *Held*, the settlement was invalid, and the assignee was entitled to possession of a mortgage representing a portion of the selling price, but he could have no judgment against the estate for the balance. *Trust Co. v. Sedgewick*, 18 N. B. R. 340.

296. When free from debt and not contemplating bankruptcy, a bankrupt, without the intervention of a trustee, made a conveyance to his wife of certain lands free from his control to her separate use. In the deeds he reserved to himself a power of revocation, in whole or in part, by express terms, and also the power to appoint to any

such uses or persons as he should designate. Two years later he filed a petition in voluntary bankruptcy and was adjudged bankrupt, and his assignee brought suit in equity to avoid the transfers. *Held*, that the conveyances would be upheld. *Jones, Ass., v. Clifton*, 18 N. B. R. 125; 17 Amer. Law Reg. (N. S.) 713; 6 Reporter, 324; 7 Cent. Law J. 89; Fed. Cas. 7,457.

297. A member of a firm of debtors appropriated money of the firm for the purchase of a homestead and claimed it as exempt, which claim was disallowed. He then gave a mortgage on the premises, his wife joining in the conveyance. The assignee of the firm demanded the surrender of the land and release of the mortgage. The debtor alleged that his wife refused to give up the property. *Held*, that the wife acquired no interest in the property, it having been purchased in fraud of creditors. *In re Boothroyd*, 15 N. B. R. 368; 2 Cen. Law Bul. 139; Fed. Cas. 1,653.

### XIII. MISCELLANEOUS DECISIONS AS TO TITLE, ETC.

298. If the owner of the land over which a country road is laid retains an interest in all mines, quarries, timber and earth, he retains it only so far as is compatible with the rights of the public in the highway. *Kinzie v. Winston*, 4 N. B. R. 21; Fed. Cas. 7,835.

299. If the fee of an estate was mortgaged to its full value it would still be property, and the purchaser would take the title with the possibility of being able to compromise the mortgage debt for less than the full amount, or of discharging it by some legal defense; but the estate would not be founded upon a contingency. So a purchaser buys an estate subject to the contingency of its appreciation; but the contingency is not the foundation of the estate, but a mere incident of its existence. *Id.*

300. The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the terms of its charter. The purchaser must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the state, the public and individuals, none of whose rights

can be impaired by the transfer. *Adams v. Boston, H. & E. R. Co.*, 4 N. B. R. 99; 5 Amer. Law Rev. 375; 18 Pittsb. Leg. J. 154; Fed. Cas. 47.

301. A donee may convey a fee, if authorized by the terms of his power, although by the instrument creating it he has himself only an estate for life. *Hall v. Bliss et al.*, 14 N. B. R. 320.

## ESTOPPEL.

- I. OF PARTNERS.
- II. BY REPRESENTATIONS.
- III. BY CONDUCT.
- IV. BY LACHES.
- V. IN GENERAL.

See CONVEYANCES, 21; PARTNERS; TRUSTEES, 15, 72.

### I. OF PARTNERS.

1. One member of a firm cannot estop himself, as between himself and the firm creditors, by any dealings with a partner, from any duty that he owes such creditors. *In re Gorham*, 18 N. B. R. 419; 11 Chi. Leg. News, 58; 9 Biss. 23; 26 Pittsb. Leg. J. 112; Fed. Cas. 5,624.

2. It having been represented by the firm that certain notes were business paper, and the holder having parted with his money on the faith of the representation, the assignee of the firm cannot deny it. *In re Many et al.*, 17 N. B. R. 514; Fed. Cas. 9,054.

### II. BY REPRESENTATIONS.

3. Where it is represented that a note has been paid, this does not act as an estoppel, unless some actual loss has resulted in the particular case. *In re Elliott Felting Mills*, 13 N. B. R. 160; 2 Lowell, 440; Fed. Cas. 789.

4. A creditor who assents by word or act, or even by silence, at a meeting of creditors is estopped to set up the deed as an act of bankruptcy. *In re Massachusetts Brick Co.*, 5 N. B. R. 408; 2 Lowell, 58; 4 Amer. Law T. 220; Fed. Cas. 9,259.

5. Making of notes is not such a representation as will estop the maker from showing them to be accommodation notes. *In re Dodge et al.*, 17 N. B. R. 504; 9 Ben. 480; Fed. Cas. 3,943.

6. Where McK. & A. contracted with the petitioners to build an engine and deliver same, and procured payment upon the representation that the article manufactured had been delivered to a transportation company for delivery, the assignee was estopped to deny the existence or identification of the article manufactured. *In re McKay & Aldus*, 3 N. B. R. 12; 1 Lowell, 345; 2 Amer. Law T. 105; 1 Chi. Leg. News, 337; 1 Amer. Law T. Rep. Bankr. 133; Fed. Cas. 11,978.

### III. BY CONDUCT.

7. Creditors who are beneficiaries under a general assignment without preference, and who have assented in writing to a substitution of assignees thereunder, are estopped from opposing the discharge of the debtor in bankruptcy on the ground that such assignment was a fraud on the bankrupt act. *In re Schuyler*, 2 N. B. R. 169; 3 Ben. 200; 16 Pittsb. Leg. J. 94; 2 Amer. Law T. Rep. Bankr. 35; Fed. Cas. 12,494.

8. Where creditors who have received full payment of debt sign a composition agreement whereby other creditors are misled and injured, they are estopped from denying its validity. *Bean v. Brookmire & Renkin*, 7 N. B. R. 568; 2 Dill. 108; 5 Chi. Leg. News, 314; 2 Amer. Law Rec. 222; 6 Amer. Law T. Rep. 418; 7 West. Jur. 324; Fed. Cas. 1,170.

9. Owners of property may be estopped to set up their title to the same if it appears that they failed to assert such title when it was claimed by another, and that they suffered such claimant without objection to sell the property to an innocent third person for a valuable consideration. *Willis v. Carpenter*, 14 N. B. R. 521; Fed. Cas. 17,770.

10. Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. *Id.*

11. Creditors cannot be heard to allege that an assignment is fraudulent because of facts of which they were fully informed, where they have concurred in execution of assignment. *Johnson, Ass., v. Rogers et al.*,

15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

12. Application to have assignee's bond increased, after assignment under state law, does not estop creditor from claiming such assignment was an act of bankruptcy. *In re Langley*, 1 N. B. R. 155.

13. Where creditors offered to refrain from proceeding in bankruptcy provided the assignee under voluntary assignment were changed, and one suitable to them appointed, the assignment, although untainted by fraud, was an act of bankruptcy, and the creditors were not estopped from proceeding in bankruptcy. *In re Spicer & Peckham v. Ward & Trow*, 3 N. B. R. 137; Fed. Cas. 13,341.

14. When a partner retires from a firm, but permits his name to remain for the benefit of the other partners, he will be estopped from denying liability to persons who bought the note of the new firm in ignorance of the dissolution, and in reliance in part on his name. *In re Krueger et al.*, 5 N. B. R. 439; 2 Lowell, 66; Fed. Cas. 7,941.

15. Where proofs of loss by fire were presented by the insured and payment demanded, no objection being made to the proofs at the time, the insurance company is estopped to object. *In re Republic Ins. Co.*, 8 N. B. R. 197; 3 Ins. Law J. 390; 5 Chi. Leg. News, 335; Fed. Cas. 11,705.

### IV. BY LACHES.

16. A creditor, who had recovered judgment and had receiver appointed before filing of said petition, is estopped to make application nearly a year after adjudication to set it aside for fraud and collusion because she was guilty of laches, and that a prior petition abandoned for lack of proof was no excuse. *In re Meade*, 19 N. B. R. 335; Fed. Cas. 9,370.

### V. IN GENERAL.

17. Where the trustee has proved the claim for a note against the estate of the payee in bankruptcy, and where the holder has not on the faith thereof changed his position in regard to the note, the trustee is not estopped from disputing the claim of the holder. *In re Dodge et al.*, 17 N. B. R. 504; 3 Ben. 430; Fed. Cas. 3,948.

18. Where the declaration of bankruptcy has been suggested as a defense to an action and not denied, the plaintiff is estopped from further proceeding with his suit in the absence of an order authorizing it. *Penny v. Taylor*, 10 N. B. R. 200; Fed. Cas. 10,957.

19. Discharge from bankruptcy does not free from estoppels arising from covenants of warranties in a deed; the covenantee is still estopped, though discharged in bankruptcy, from setting up after-acquired title. *Bush v. Person*, 18 How. 82.

20. A party to a contract with a foreign corporation, which has not done what the statute requires as a condition of doing business in the state, is not estopped to show the legality of the contract. In re *Comstock & Co.*, 11 N. B. R. 169; 8 Sawy. 218; 7 Chi. Leg. News, 126; Fed. Cas. 3,078.

21. The fact that a bankrupt is adjudicated upon a petition charging him with making a fraudulent conveyance does not estop his grantee from claiming that as to him the conveyance is valid. In re *Marter*, 12 N. B. R. 185; Fed. Cas. 9,143.

22. The purchaser of property, sold by an assignee subject to a lien by order of a bankrupt court, is estopped to deny the validity of the lien. *Bucknam v. Dunn et al.*, 16 N. B. R. 470; 2 Hask. 215; Fed. Cas. 2,096.

23. Where a bankrupt had given a mortgage to secure A. against loss, and where A. sustained no loss, and where the bankrupt later, and within four months before commencement of proceedings against him, gave B. a second mortgage, and where both mortgagees received money for the release of their mortgages, recovery was had in a suit against B. *Held*, the assignee was not estopped to maintain an action against A. *Sessions v. Johnson et al.*, Ass., 17 N. B. R. 65; 95 U. S. 347.

## EVIDENCE.

### I. COMPETENCY.

(a) *Of Evidence.*

(b) *Of Witnesses.*

### II. ADMISSIBILITY IN GENERAL.

### III. PRESUMPTIONS.

### IV. EXAMINATION OF WITNESSES.

(a) *Proper Questions.*

(b) *General.*

### V. RECORDS AND COPIES.

### VI. WIFE OF BANKRUPT.

### VII. REFEREE'S AUTHORITY.

### VIII. ASSIGNMENT AS EVIDENCE.

### IX. BURDEN OF PROOF.

### X. DEPOSITIONS.

(a) *In Proof of Debts.*

(b) *In Proof of Acts of Bankruptcy.*

(c) *General.*

### XI. INSTRUCTIONS TO JURY.

### XII. MISCELLANEOUS.

See ACTS OF BANKRUPTCY, 24; BANKS, 40; CLAIMS, 18; CONVEYANCES, 82, 86; CORPORATIONS, 55; CRIMES AND OFFENSES, 8, 14; DISCHARGE, 88, 210, 226; EXAMINATION OF BANKRUPT, 4, 10, 11, 15, 16, 24, 31, 35, 37, 42, 71, 76; FRAUD, 6, 80; INSOLVENCY, 11; MORTGAGES, 21, 125; NOTARY, II; NOTICE, 8; PARTNERS, 85, 163, 164; PETITIONS, 118; PLEADING AND PRACTICE, 71-83, 294, 311; PREFERENCES, 30, 64, 73, 74; PROOF OF CLAIMS, 31, 53, 60, 75; RECEIVERS, 17; SALES, 3, 36, 38; SET-OFF, 12; TRUSTEES, 45.

### I. COMPETENCY.

See DISCHARGE, 210.

#### (a) *Of Evidence.*

1. An injunction order and proof of its service are competent evidence to show that a debtor making payment to a bankrupt after adjudication had notice of the demand of the assignee. *Babbit v. Burgess*, 7 N. B. R. 561; 2 Dill. 169; 5 Chi. Leg. News, 326; Fed. Cas. 693.

2. Evidence cannot be received to contradict the declaration and show that no such cause of action really exists as is therein set forth. In re *Devoc*, 2 N. B. R. (8 vo. ed.) 27; 1 Lowell, 251; Fed. Cas. 3,843.

3. A sworn statement of an officer of a corporation which has been filed is competent evidence against the corporation, but it is not conclusive. In re *Oregon B. P. and P. Co.*, 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

4. In an action for injury to building by alterations, the opinion of an expert familiar with the market and rental value of such premises is competent. In re *Jewell et al.*, 19 N. B. R. 383; Fed. Cas. 7,302.

5. Where the witness has since died, his examination before an examining court is

competent evidence in a trial of the same party for the same offense. *United States v. Penn*, 13 N. B. R. 464; *Fed. Cas.* 16,025.

### (b) *Of Witnesses.*

6. A witness is not rendered incompetent by reason of the fact that an assignee has filed a petition against him with others in the proceedings in relation to the property of the bankrupt and an injunction awarded thereon. *In re Feinberg*, 2 N. B. R. 137.

7. An administrator brought suit on certain promissory notes against M. as principal and J. as surety. J. alone was served, and suit was continued as to M., appearance having been improperly entered. A motion was made by J. for a continuance, the affidavit showing that M. was a material witness, he not having appeared. After the making of the note he had been adjudged bankrupt. *Held*, M. was not a competent witness for J., both being principals as between them and the payee. *Jenks v. Opp*, 12 N. B. R. 19.

8. If a defendant has admitted that a statement made by the bankrupt on his examination is true, the statement may be proved by the testimony of any one who heard it. *Goodrich v. Wilson*, 14 N. B. R. 555.

9. A bankrupt may testify to support a claim of his wife against the estate, where such testimony would be competent under the state laws in force prior to December 1, 1873. *In re Bean*, 14 N. B. R. 182; 2 *Wkly. Notes Cas.* 432; *Fed. Cas.* 1,166.

10. In proceedings in bankruptcy against the estate of a deceased debtor, a creditor who had neglected to prove his claim before the second and third meeting of the creditors offered himself as a witness to prove the contract on which he based his claim. *Held*, that he could not be excluded on the ground of interest. *In re Merrill*, 16 N. B. R. 35; 9 *Ben.* 165; 24 *Pittsb. Leg. J.* 205; *Fed. Cas.* 9,466.

11. The wife of a bankrupt may be examined in bankruptcy. *In re Campbell*, 17 N. B. R. 4; 3 *Hughes*, 276; *Fed. Cas.* 2,348.

12. A creditor, though the wife of a bankrupt, is a competent witness. *In re Richards*, 17 N. B. R. 562; 10 *Chi. Leg. News*, 275; *Fed. Cas.* 11,770.

13. Copartners, having been adjudged bankrupts, were indicted for having secreted money belonging to the estate, and for fraud-

ulently omitting the same from their schedules. Upon the trial they were excluded as witnesses, and, having been found guilty, moved for a new trial upon that ground. The motion was overruled. *United States v. Black et al.*, 12 N. B. R. 340; 1 *Hask.* 570; 1 *N. Y. Wkly. Dig.* 77; *Fed. Cas.* 14,602.

14. The bankrupt is not a competent witness in a criminal proceeding against himself, under section 5132, Revised Statutes. The amendatory act of June 22, 1874, section 8, applies to civil causes only. *Id.*

15. The exclusion of husband and wife as witnesses is not based solely on interest, but rests upon principles of public policy; and though a statute may remove the ground of interest, the ground of public policy will still render them incompetent. *In re Jones et al.*, 9 N. B. R. 556; 6 *Biss.* 68; 6 *Chi. Leg. News*, 271; *Fed. Cas.* 7,444.

16. While the bankrupt act of 1867 provides for the examination of the wife of the bankrupt before the register for the purpose of ascertaining the condition of his estate, it does not alter the rule that the wife cannot be a witness for or against the husband in a motion to set aside his discharge. *Tenny et al. v. Collins*, 4 N. B. R. 156; *Fed. Cas.* 13,833.

17. The provision of law that parties may testify in federal courts in their own behalf cannot be construed by the court to exclude parties from testifying in their own behalf against assignees in bankruptcy. *Hobbs v. McLean*, 117 U. S. 567.

## II. ADMISSIBILITY IN GENERAL.

18. Assignees of certain promissory notes sued the assignors on the contract of assignment. The statute provided that the assignors should only be liable where the assignee by due diligence prosecutes the maker to insolvency, but if suit would be unavailing the assignor is liable. The court admitted evidence of the bankruptcy of the makers of the notes. *Held*, that the evidence was properly admitted. *Wills et al. v. Claffin et al.*, 13 N. B. R. 437; 92 U. S. 135.

19. Intent to perfect is to be proved as a fact. *Morgan et al. v. Mastick*, 2 N. B. R. (8 vo. ed.) 521; *Fed. Cas.* 9,803.

20. Evidence of misrepresentations made to the stockholder when he subscribed for stock, by an agent of the corporation, is not

admissible in an action by the assignee to collect an assessment made on unpaid subscriptions. *Michener v. Payson, Ass.*, 13 N. B. R. 49; 1 N. Y. Wkly. Dig. 272; 2 Wkly. Notes Cas. 339; 8 Chi. Leg. News, 17; 28 Pittsb. Leg. J. 38; Fed. Cas. 9,524.

21. A copy of the record containing the assignment was admissible, although it did not purport to be a copy of the whole record. *Id.*

22. The dying declarations of a fraudulent grantee are not admissible in a proceeding to set aside a bankrupt's discharge. *In re Marionneaux*, 13 N. B. R. 222; 1 Woods, 37; Fed. Cas. 9,088.

23. Proof of the conspiracy must precede the admission of declarations of one conspirator against his co-conspirators. *Id.*

24. Letters written by the debtor to third parties, admitting the payment of a claim, interposed by attaching creditors in favor of another alleged creditor to defeat adjudication, are admissible in evidence in a contest upon such claim between the attaching and petitioning creditors. *In re Hatje*, 12 N. B. R. 548; 6 Biss. 436; Fed. Cas. 6,215.

25. A defense may be given in evidence as an admission which has been stricken out of the case. *In re Oregon B. P. and P. Co.*, 13 N. B. R. 508; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

26. An assignee in bankruptcy sued for property received by a creditor as a preference, alleging insolvency at time of the preference. The plaintiff at the trial proposed to prove what the bankrupt had said concerning the transfer and the payment. *Held*, that the declarations of the bankrupt were competent evidence, if the conspiracy was established, although not made in the presence of or brought to the knowledge of the creditor preferred. *Nudd et al. v. Burrows, Ass.*, 13 N. B. R. 289; 91 U. S. 426.

27. A statement made by a bankrupt as to his condition at the time of borrowing money is inadmissible, for it has no bearing upon the question whether the creditor knew or had reasonable cause to believe him insolvent on a subsequent day. *Goodrich v. Wilson*, 14 N. B. R. 555.

28. It is not error to admit in evidence the assignee's bill of sale, to prove the transfer of the account sued on, to the intervenor. *Morris et al. v. Swartz*, 10 N. B. R. 305.

29. In an action brought under sections 35 and 39 of the act of 1867, the bankrupt's schedule of indebtedness is not material evidence of insolvency. *Tyler, Ass. v. Brock et al.*, 17 N. B. R. 239.

30. Under the general money counts in a declaration drawn to conform to law which was in force when a preference was given and until after adjudication in bankruptcy, such law having been amended subsequently, but before filing of petition, the court will not permit evidence to be given at the trial of a liability, contract, promise or obligation arising exclusively under the law as it was at the time of the preference. *Warren et al. v. Garber*, 15 N. B. R. 409; 1 Hughes, 365; Fed. Cas. 17,196.

31. P., as a member of J. & P., later of P. & C., sold his interest to C. & C., said sale authenticated by a writing signed by P. and witnessed by C. & C., declaring that C. & C. should become liable for all debts contracted by J. & P. and P. & C., and set out in a certain memorandum specified. In consideration of C. & C. assuming said liabilities set forth, P. accepted as payment for his interest one-third of its value. *Held*, that parol evidence was not admissible to show what was intended, contrary to the written agreement. On writ of error to the circuit court the ruling of the district court was reversed and remanded for decree in conformity to opinion of circuit court. *In re Phelps v. Classon*, 3 N. B. R. 22; Woolw. 204; 2 West. Jur. 221; Fed. Cas. 11,074.

32. A check is admissible in evidence as to whether bankrupt has kept proper books of account, and together with the stub shows just how book was kept. *In re Brockway*, 7 N. B. R. 595; 6 Ben. 326; Fed. Cas. 1,917.

### III. PRESUMPTIONS.

See *BANKS*, 40; *CONVEYANCES*, 36; *CORPORATIONS*, 55; *CRIMES*, ETC., 14.

33. Participation in the profits of a business is presumptive or primary proof that the participator is a partner in such business, and in the absence of other proof is sufficient evidence thereof; but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed, or interest for money

loaned to the person carrying on such business. In *re Francis et al.*, 7 N. B. R. 359; 2 Sawy. 286; 5 Pac. Law Rep. 218; 4 Leg. Op. 493; Fed. Cas. 5,081.

34. The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent; it is to be inferred from all the circumstances of a case, subject to the theory and presumption of law that a man intends, when he commits an act, the ordinary and usual consequences of that act, or the inevitable consequences of it. *United States v. Smith*, 18 N. B. R. 61; Fed. Cas. 16,339.

35. An individual whose name appears on the stock-book of a corporation as a stockholder is presumed to be the owner of stock in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not, or of rebutting that presumption, is cast upon the defendant. *Turnbull, Jr. v. Payson, Ass.*, 16 N. B. R. 440; 95 U. S. 418.

36. In an action to set aside a conveyance by an insolvent debtor on the ground of fraud, *held*, that fraud must be proved, not assumed. *Campbell, Ass. v. Waite et al.*, 16 N. B. R. 98; 9 Ben. 166; Fed. Cas. 2,374.

37. Where a debtor is in fact insolvent, and a creditor has notice of a state of facts constituting in law such insolvency, then there arises a presumption of actual knowledge, which is conclusive until rebutted by proper proof. In *re Hauck*, 17 N. B. R. 158; Fed. Cas. 6,219.

38. Where an insolvent debtor confesses judgment, and such confession is followed by execution and seizure, it is presumed that such act was done with intent to give a preference, and the contrary must be shown. *Webb, Ass. v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

39. There is a strong, if not conclusive, presumption, after the final discharge of a bankrupt is granted, that the final oath required by section 29 of the act of 1867 was duly taken; and the mere fact that the oath is not upon the files does not overcome this presumption. *Young et al. v. Ridenbaugh's Adm'r.*, 11 N. B. R. 568; 8 Dill. 239; 7 Chi. Leg. News, 242; Fed. Cas. 18,173.

40. Where the record before the court does not show that a precedent agreement existed

between an insolvent debtor and a creditor such agreement is not to be assumed. A mere promise does not constitute an agreement. *Sec. Nat. Bank v. Hunt*, 4 N. B. R. 198; 11 Wall. 398.

#### IV. EXAMINATION OF WITNESSES.

##### See EXAMINATION OF BANKRUPT.

##### (a) *Proper Questions.*

41. A witness must answer all proper questions relating to his trade and dealings with a bankrupt prior to commencement of proceedings; and if to answer properly, fully and truthfully any such question it is necessary that the witness should produce a copy of any transaction of his with the bankrupt, such copy must be produced. In *re Earle*, 8 N. B. R. 81; Fed. Cas. 4,244.

42. At examination before register bankrupt declined to answer a question asked by register. *Held*, that he must answer. In *re Holt*, 8 N. B. R. 58; Fed. Cas. 6,646.

43. A bankrupt will be compelled to answer questions concerning the acquisition and possession of money after the filing of his petition. In *re McBrien*, 8 N. B. R. 90; 8 Ben. 481; Fed. Cas. 8,666.

44. A witness cannot refuse to testify before the register concerning his dealings with the bankrupt on the ground that his answers may furnish evidence against him in a civil action on behalf of the assignee. In *re Fay*, 3 N. B. R. 163; Fed. Cas. 4,708.

45. A witness is not compelled to answer, on cross-examination, a question which does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, a truthful answer to which would tend to degrade him. In *re Lewis*, 3 N. B. R. 153; 4 Ben. 67; 39 How. Pr. 155; Fed. Cas. 8,312.

46. Where it is shown that the witness has knowledge of the location, situation and condition of the bankrupt's property, and the fraudulent disposal thereof, he may be compelled to testify thereto, notwithstanding issue be not joined nor any fact be in dispute. In *re Blake*, 2 N. B. R. 2; Fed. Cas. 1,492.

47. A question relating to transactions between the witness and the bankrupt must be answered. In *re Stuyvesant Bank*, 7 N. B. R. 445; 6 Ben. 33; Fed. Cas. 13,582.

48. A witness on re-examination cannot be asked whether he made a certain statement, such question being leading. *Ives et al. v. Tregent*, 14 N. B. R. 60.

49. A witness who purchased claims against a bankrupt's estate was examined as to where he obtained the money paid therefor, and answered that it did not come from the bankrupt. *Held* bound, on pain of contempt, to state where he did obtain it. *In re Lathrop et al.*, 4 N. B. R. 93; Fed. Cas. 8,106.

50. Counsel cannot be compelled to disclose any information imparted to him as counsel for bankrupt, nor to disclose information received on behalf of the bankrupt, as to the bankrupt's affairs, from persons to whom he was referred by the bankrupt. The privilege of counsel does not extend to the concealment of the subject discussed but only of the discussion itself. *In re Aspinwall*, 10 N. B. R. 448; 81 Leg. Int. 365; 22 Pittsb. Leg. J. 75; 7 Ben. 433; Fed. Cas. 591.

51. G., an attorney for bankrupt, received certain property from bankrupt and immediately deeded it to bankrupt's wife, the intention being to defeat creditors of bankrupt. Questioned concerning the transaction, G. declined to answer upon the ground of confidential communications between attorney and client. *Held*, the questions were pertinent and G. should answer. *In re Bellis et al.*, 8 N. B. R. 49; 3 Ben. 386; 8 Amer. Law Reg. (U. S.) 747; 38 How. Pr. 79; 3 Amer. Law T. 170; Fed. Cas. 1,274.

52. Witness, being asked concerning his connection with an auction sale of goods belonging to bankrupt prior to adjudication, declined to answer on the ground that he had obtained the information through the relation of attorney and client. *Held*, that it was concerning his acts that he was interrogated, and therefore not privileged. *In re O'Donohoe*, 3 N. B. R. 59; Fed. Cas. 10,435.

#### (b) General.

53. A witness summoned by a creditor is not allowed to have attending counsel, except when he is made a party to a new collateral proceeding by being cited to answer for a contempt. *In re Feinberg et al.*, 2 N. B. R. 137.

54. A witness is not entitled to counsel in

his examination before the register, although the examination of the witness may establish a liability on his part to the bankrupt. *In re Stuyvesant Bank*, 7 N. B. R. 445; 6 Ben. 83; Fed. Cas. 13,582.

55. Creditors have no right to intervene and interpose objections to questions put in the course of examination of a witness by another creditor. *Id.*

56. It was not necessary to give notice to bankrupt of time and place of examination of witnesses. *In re Levy*, 1 N. B. R. (8 vo. ed.) 107; 2 Ben. 169; Fed. Cas. 8,297.

57. Where the complainant knows what the goods, transferred in fraud of the bankrupt act, consisted of, he cannot claim equity jurisdiction on the ground of discovery because he is ignorant of their precise amounts, for he can compel the examination of the preferred creditor and obtain a full disclosure. *Garrison, Ass., v. Markley*, 7 N. B. R. 246; Fed. Cas. 5,256.

58. A witness cannot refuse to be sworn on the ground that he had acted as counsel for the bankrupt and is still his legal adviser. *In re Woodward et al.*, 3 N. B. R. 177; 4 Ben. 102; Fed. Cas. 17,999.

59. A witness regularly summoned, on application of the assignee in bankruptcy proceedings, objected to being examined on the ground that the bankrupt himself had not been examined, and urged that there was no question in controversy to be settled by testimony. The register overruled the objections. The witness did not stand upon his objections, but submitted himself to examination. The court sustained the register, but stated that by submitting himself to examination the witness waived his objections. *In re Fredenburg*, 1 N. B. R. 84; 2 Ben. 133; Fed. Cas. 5,075.

60. If a witness under oath makes contradictory statements as to material facts, a jury is justified in rejecting all of his testimony. *United States v. Bayer*, 13 N. B. R. 88; Fed. Cas. 14,548.

61. An attachment will not be issued for a witness when the commission issued by the district court is not accompanied by any interrogatories, nor furnishes any information as to the inquiry in relation to which the witness is to be examined. *In re Glaser*, 2 N. B. R. 129; Fed. Cas. 5,476.



62. A creditor is not entitled to witness fees for attendance. In re Kyler, 2 N. B. R. (8 vo. ed.) 650.

### V. RECORDS AND COPIES.

63. The statute making certified copies of proceedings in one state the "best evidence" in judicial proceedings in another state is not restricted to the case of judgments. In re Rooney, 6 N. B. R. 168; Fed. Cas. 12,032.

64. The certified copy of the examination of a debtor in another state was objected to as not the best evidence under supplemental proceedings upon a judgment, offered to prove the admissions of a debtor. *Held*, that it came within the statutory "judicial proceedings." *Id.*

65. In a suit to recover the amount of an assessment by the assignee of a bankrupt corporation in United States district court, a copy of the record of the proceedings in bankruptcy, certified by the clerk under the seal of the court, without the certificate of the judge that the attestation was in due form, was properly admitted as *prima facie* evidence of the facts which it set forth. Turnbull, Jr. v. Payson, Ass., 16 N. B. R. 440; 95 U. S. 418.

66. Where it is necessary to prove the insolvency of a debtor at the time of executing certain chattel mortgages whereby a sale was made to a stranger, said mortgages being executed and the sale made prior to the institution of a suit in bankruptcy, the records in the suit in bankruptcy are not the best evidence. Marsh et al., Ex'rs, v. Armstrong, 11 N. B. R. 125.

67. The only evidence of meeting and action of the directors of a corporation as a board in making a deed is the record kept by the secretary. In re St. Helen's M. Co., 10 N. B. R. 415; 3 Sawy. 88; Fed. Cas. 12,222.

### VI. WIFE OF BANKRUPT.

68. The wife of a bankrupt, on examination before a register, declined to answer because the matters inquired of were her private business. *Held*, that the same were pertinent and proper. In re Craig, 4 N. B. R. 50; Fed. Cas. 3,323.

69. The wife of a bankrupt may be compelled to attend and be examined in refer-

ence to her husband's estate, and upon refusal to answer may be punished for contempt. In re Woolford, 8 N. B. R. 118; 4 Ben. 9; Fed. Cas. 18,020.

70. Usual order and subpoena for the wife of bankrupt was issued to appear and testify, and, in explanation of her failure to obey, the right of the court to compel her attendance was denied. *Held*, that the court had power to compel attendance, and order to show cause why a warrant should not issue was the proper proceeding. In re Bellis et al., 8 N. B. R. 65; 38 How. Pr. 88; 1 Amer. Law T. Rep. Bankr. 178; Fed. Cas. 1,276.

71. The wife of a bankrupt is not required to attend and be examined as a witness unless the usual fees are paid or tendered to her. In re Van Tuy, 2 N. B. R. 25; Fed. Cas. 16,881.

### VII. REFEREE'S AUTHORITY.

72. The register has no power to decide on the competency, materiality or relevancy of any question, and has therefore no power to exclude or overrule any question. In re Rosenfield, 1 N. B. R. 60; 15 Pittsb. Leg. J. 245; 1 Amer. Law T. Rep. Bankr. 47; Fed. Cas. 12,059.

73. A register is not authorized to hear testimony as to a creditor's right to vote for assignee without special order of the court. In re Noble, 3 N. B. R. 25; 3 Ben. 332; Fed. Cas. 10,282.

74. The register must have power in composition proceedings, subject to the reviewing power of the court, to conduct the inquiries, take down the substance of the answers and adjourn the meeting by consent of parties, and in some cases against the wishes of one; but not to conduct a written examination as to all the inquiries and investigation proper in bankruptcy; and in most cases he would be justified in refusing to permit the inquiries to extend beyond the day of meeting. In re Proby, 17 N. B. R. 175; 12 Amer. Law Rev. 598; Fed. Cas. 11,439.

75. A register can require no person to testify except the debtor at a composition meeting. In re Dobbins, 18 N. B. R. 268; Fed. Cas. 3,943.

76. The register, without application to the court, has the power to make the order, under section 26 of the act of 1867, requir-

ing witnesses to appear and be examined, and they may be examined fully as to liens against the bankrupt's estate. In re Pioneer Paper Co., 7 N. B. R. 250; Fed. Cas. 11,178.

77. The register cannot make any binding decision, or compel a witness to answer, if he refuses. In re Koch, 1 N. B. R. 153; 1 Amer. Law T. Rep. Bankr. 121; 15 Pittsb. Leg. J. 531; Fed. Cas. 7,918.

78. A register holding provisionally a court of bankruptcy before whom a witness refuses to answer a question should, if he believes the question a proper one, so declare. If exception to this ruling is taken he should certify it for the summary consideration of the court, the examination proceeding in its other parts. If the witness, without such exception, refuse to answer, his contumacy should be reported. In re Reakirt, 7 N. B. R. 329; Fed. Cas. 11,614.

79. To prove what proceedings have taken place before him, the entries of a register may be used as evidence. As to the number of days that a witness was in attendance before a register, the certificate of the clerk is but *prima facie* evidence. In re Crane & Co., 15 N. B. R. 120; 1 Tex. Law J. 41; Fed. Cas. 8,352.

### VIII. ASSIGNMENT AS EVIDENCE.

80. In suits by an assignee, his representative character need not be averred in the pleadings. If a duly certified copy of the assignment be put in evidence, it is not necessary to prove all the steps in the proceedings. Dambmann v. White et al., 12 N. B. R. 438.

81. Notice to a creditor of an act of bankruptcy does not affect a transfer to him otherwise than that it tends to show that such transfer was made in fraud of the bankrupt act. In re Catlin, 9 N. B. R. 342; 2 Sawy. 486; 21 Pittsb. L. J. 159; Fed. Cas. 2,521.

82. In proof of commercial paper acquired before maturity, the holder need only prove the consideration paid by him. In re Lake Sup. S. C. etc. Co., 10 N. B. R. 76; Fed. Cas. 7,998.

83. The instrument made by the judge of a court of bankruptcy, or by the register, is the best evidence of the fact of bankruptcy, and oral testimony is not admissible unless it is shown that the original or a cer-

tified copy cannot be produced. Buck v. Winters, Ass., 15 N. B. R. 140.

84. The record of the assignment is not necessary to give force or validity to the transfer to the assignee, or for the purpose of constructive notice, but to enable the purchaser under the assignee to have in the proper county a record of his derivative title. Davis v. Anderson, 6 N. B. R. 146; Fed. Cas. 3,623.

85. If the debtor assists in obtaining judgment on which execution has followed, this may be placed in evidence in support of an act of bankruptcy. In re Woods, 7 N. B. R. 126; 20 Pittsb. Leg. J. 21; Fed. Cas. 17,990.

### IX. BURDEN OF PROOF.

See CONVEYANCES, 32; CRIMES AND OFFENSES, 8, 14; DISCHARGE, 88.

86. A petitioning creditor may offer proof tending to show the debtor's insolvency, and the debtor must explain the evidence, as he is best acquainted with the condition of his own affairs. In re Oregon B. P. & P. Co., 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

87. The party who alleges that proceedings in bankruptcy have been dismissed, when an adjudication of bankruptcy has been proved, must prove the time of the dismissal. Willis et al. v. Clafin et al., 13 N. B. R. 437; 92 U. S. 135.

88. The thirty-fifth section of the bankrupt act of 1867, which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor shall be *prima facie* evidence of fraud, throws the burden of proof on the purchaser to sustain the validity of the purchase. In such a case the proofs may be taken *ore tenus* at the hearing. Wilson v. Stoddard, 4 N. B. R. 76; 2 Chi. Leg. News, 161; Fed. Cas. 17,838.

89. To constitute absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such, and burden of proof is upon the party alleging the fact. In re Parker et al., 19 N. B. R. 340; Fed. Cas. 10,721.

90. On objections to discharge, *held*, that burden of sustaining specifications is upon opposing creditors. In re Herdic, 19 N. B. R. 385; Fed. Cas. 6,408.

91. A debtor while insolvent transferred a large portion of his property to one creditor without making provision for an equal distribution of its proceeds to all his creditors. *Held*, that this necessarily operates as a preference, and is conclusive evidence that a preference is intended, unless debtor can show that he was at the time ignorant of his insolvency and that he could reasonably expect to pay all his debts. In such a case the burden of proof is on him and not upon the assignee or contestant in bankruptcy. *Toof v. Martin*, 6 N. B. R. 49; 13 Wall. 43.

92. A charge of fraud in the concealment of bankrupt's estate from which badges and indices of fraud are deducible must be overborne by positive testimony. In *re Goodridge*, 2 N. B. R. 105; Fed. Cas. 5,547.

93. In answer to a petition for adjudication, a general denial was entered, but no demand for trial by jury. *Held*, that the burden of refuting the allegations of the petition was on respondent. In *re Price et al.*, 8 N. B. R. 514; Fed. Cas. 11,411.

94. Under the act of 1867, where there is a simple denial, the burden is upon the respondent to disprove the allegations of the petition, and, if no evidence is introduced, the petitioning creditor is entitled to an adjudication in bankruptcy. In *re Jelsh et al.*, 9 N. B. R. 412; Fed. Cas. 7,257.

95. The burden of proof is on the creditor to show that the debtor suffered or procured his property to be taken on legal process with intent to defraud creditors. In *re King*, 10 N. B. R. 103; Fed. Cas. 7,783.

96. In an issue by the debtor (act June 22, 1874) as to whether petitioning creditors constitute requisite proportion, the affirmative of the issue is on the petitioning creditors. In *re Hymes*, 10 N. B. R. 433; 7 Ben. 427; Fed. Cas. 6,986.

## X. DEPOSITIONS.

### (a) *In Proof of Debts.*

#### See ACTS OF BANKRUPTCY, 24.

97. A deposition was filed in proof of a debt that was incorrectly entitled in the case. The register refusing to accept it, it was altered and again offered, but was not re-sworn to. The register again refused it. The refusal was approved by the court. In

*re Walther et al.*, 14 N. B. R. 273; Fed. Cas. 17,126.

98. Where a commissioner, taking a deposition in proof of debts, failed to sign the jurat, the omission may be supplied if he recollects the fact of the creditor signing and verifying in his presence. Otherwise the party may be sworn and the deposition filed *nunc pro tunc*. In *re McKibben*, 12 N. B. R. 97; Fed. Cas. 8,859.

99. The receiver of a corporation presented proof of claim without a deposition supporting it, but the claim was re-examined and held valid, one of the officers of the corporation being examined under oath. The receiver was given leave to amend by producing the deposition of one of the corporation's officers, but the officer refused to testify. *Held*, that the deposition given at the re-examination could be filed with the same effect as if originally made as a deposition under General Order 34, act of 1867. In *re Baxter et al.*, 18 N. B. R. 560; Fed. Cas. 1,121.

100. A deposition of a creditor setting forth a claim against a bankrupt for unliquidated damages for a breach of contract, which does not appear in the bankrupt's schedules, is not proof thereof, unless the amount thereof is fixed by assessment, application for which must be made by the creditor. In *re Clough*, 2 N. B. R. 59; 2 Ben. 508; 16 Pittsb. Leg. J. 25; Fed. Cas. 2,905.

101. A deposition was offered in proof of a debt in bankruptcy. The statement of consideration was insufficient, one of the certificates lacked a seal, and in other respects the requirements of section 5077, Revised Statutes, were not complied with. The deposition was held to be insufficient. In *re Port H. D. D. Co.*, 14 N. B. R. 253; Fed. Cas. 11,293.

102. Depositions in proof of a debt against a bankrupt are not admissible if taken before any officer other than one of the registers of the court in which proceedings are pending, unless the creditor be a non-resident of such district (act of 1867). In *re Hailey*, 2 N. B. R. 13; Fed. Cas. 5,918.

103. A. presented for proof against bankrupt's estate an account for goods sold to the bankrupt by B., which account was duly assigned to A. for value, before bankruptcy, the deposition of A. only being produced. *Held*, that it was not necessary that B. should

join in the deposition before the debt should be admitted to proof. In re Fortune, 8 N. B. R. 83.

(b) *In Proof of Acts of Bankruptcy.*

104. The allegations in the deposition in proof of the act of bankruptcy should be made upon the personal knowledge of the deponent, and should make out a *prima facie* case. Such allegations should be made by separate deposition, and not in the petition itself. In re Hadley, 12 N. B. R. 366; Fed. Cas. 5,894.

105. In order to authorize the making of an order to show cause, the deposition of acts of bankruptcy must be such as constitutes legal testimony. In re Rosenfields, 11 N. B. R. 86; 8 Amer. Law Rec. 724; 1 Cent. Law J. 583; Fed. Cas. 12,061.

106. A creditor filed a petition in regular form against a debtor, and also presented depositions in support of the allegations of the petition and filed them. An order to show cause issued, and the debtor moved the court to dismiss the proceedings on the ground that the deposition was insufficient. *Held*, that a deposition to an act of bankruptcy consisting of a fraudulent conveyance must allege or show the fraudulent intent of the debtor in making the conveyance. Cunningham v. Cady, 13 N. B. R. 525; 8 Chi. Leg. News, 165; 4 Amer. Law Rec. 510; Fed. Cas. 8,480.

(c) *General.*

107. Affidavits or depositions taken before a register after the filing of the petition are valid, although proceedings may not be pending before him. In re Deane, 2 N. B. R. 29; 15 Pittsb. Leg. J. 581, 583; Fed. Cas. 3,700.

108. Foreign creditors offered for filing a deposition executed before a United States consular agent, which deposition the register refused to file "because not taken before any of the officers authorized by section 5079 of the Revised Statutes to take proofs of debt in a foreign country." Register sustained. In re Lynch et al., 16 N. B. R. 28; 24 Pittsb. Leg. J. 205; Fed. Cas. 8,635.

109. Testimony in bankruptcy proceedings can only be taken on commission, not on notice. In re Dunn et al., 9 N. B. R. 487; Fed. Cas. 4,173.

110. A witness summoned on behalf of a bankrupt, on his examination before the register, exhibited certain papers which were marked as part of his deposition and filed with it. *Held*, that such papers became a part of the depositions, and could not be withdrawn, and a copy substituted, except upon the application of a party showing a proper use therefor. In re McNair, 2 N. B. R. 109; Fed. Cas. 8,908.

111. When depositions are not taken *ex parte* or *de bene esse* under the act of 1789, or both parties appear and examine and cross-examine, the depositions being subsequently placed on file, the party at whose instance they were taken cannot object to their being read by the opposite party on the ground of irregularity or informality. Lawrence, Ass., v. Graves, 5 N. B. R. 279; Fed. Cas. 8,138.

112. A commission was issued from the United States district court for the northern district of New York to take testimony in Chicago. A summons issued from the circuit court for the northern district of Illinois, and was duly served upon a witness who appeared but refused to testify. Upon proceedings for contempt it was held that the commission was issued with proper authority. In re Johnston, 14 N. B. R. 569; Fed. Cas. 7,423.

XI. INSTRUCTIONS TO JURY.

113. Where the defense is based upon an alleged fraud, it is error to introduce into the instruction upon that point, facts pertaining to another fraud. Upton, Ass., v. Tribilcock, 13 N. B. R. 171; 91 U. S. 45.

114. In instructing the jury the court may comment upon the evidence, if it is understood by the jury that what is said concerning the facts is only advisory. Nudd et al. v. Burrows, Ass., 13 N. B. R. 239; 91 U. S. 426.

115. If a power of sale to the mortgagor to sell and replace goods in such manner as he may determine and use the proceeds as he sees fit is inserted in the mortgage, it is proved by the production of the mortgage, and the mortgage would be held void by the court. If not, it may be proved by parol, or inferred from circumstances and the conduct of the parties, and then it would become the duty of the court to instruct the

jury that such power of sale by consent or understanding avoids the mortgage. In re Kahley, 4 N. B. R. 124; 2 Biss. 883; 3 Chi. Leg. News, 85; 2 Leg. Gaz. 405; Fed. Cas. 7,593.

116. Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province of juries. Sec. Nat. Bank v. Hunt, 4 N. B. R. 198; 11 Wall. 891.

117. On motion for a new trial on the issue of bankruptcy, on the ground of error in the admission of evidence as to negotiation between the petitioning creditors and the respondents, preceding the consummation of a compromise between them, *held*, such evidence properly admissible, and that it was also proper to charge the jury that they could use this testimony only as it bore upon the fact whether an arrangement was made, and its character. In Jelsh et al., 9 N. B. R. 412; Fed. Cas. 7,357.

## XII. MISCELLANEOUS.

118. A creditor, after examination before the register touching his claim, may file supplemental proof of claim corresponding with the facts shown by his testimony. In re Montgomery, 3 N. B. R. 108; Fed. Cas. 9,729.

119. The taking of the direct examination of a witness is a service rendered for and required by the party calling such witness, and the taking of the cross-examination of such witness is a service rendered for and required by the party cross-examining such witness. In re Mealy, 2 N. B. R. 51; Fed. Cas. 9,378.

120. Counsel asked whether, in case he should withdraw his appearance and suffer a default to be taken against his client, all the allegations in the petition would be taken as true in subsequent proceedings for discharge, to the prejudice of the bankrupt. Answered in the negative. In re Lathrop et al., 3 N. B. R. 11; 2 Amer. Law T. 124; Fed. Cas. 8,105.

121. Informality in proofs will not avail where the creditor, as a witness, has sworn positively of his own knowledge. McKinsey et al. v. Harding, 4 N. B. R. 10; Fed. Cas. 8,866.

122. A judgment creditor may refuse to

be examined in relation to a question of usury in a debt for which the judgment was rendered. *Id.*

123. A court will not take judicial knowledge of a discharge, and if not pleaded a valid judgment may be rendered against a bankrupt. Jenks v. Opp, 12 N. B. R. 19.

124. To entitle defendant to an acquittal the doubt in the minds of the jury must be a reasonable one; the evidence must be insufficient to establish guilt. United States v. Bayer, 18 N. B. R. 88; Fed. Cas. 14,543.

125. One of the grounds of appeal was that witnesses were examined orally in open court instead of having their testimony taken by an examiner. Appeal dismissed. Samson v. Burton, 6 N. B. R. 403.

126. The form of words used in conversations between a debtor and his creditor should be very little regarded when the words were not in themselves acts, or inducements to act. In re Hafer et al., 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 164; Fed. Cas. 5,897.

127. A bankrupt was proven to be a stout, healthy, unmarried man of twenty-seven years of age, who lived and worked with his father all of his life, except for three years spent in military service, during which he drew no pay less than that of sergeant. *Held*, not evidence of concealment of estate. In re Sidle, 2 N. B. R. 77; Fed. Cas. 12,844.

128. A sale by a person contemplating bankruptcy is not *prima facie* fraudulent unless surrounded by unusual circumstances, and is not then void as to purchasers in good faith. In re Hunt, 2 N. B. R. 166; 1 Chi. Leg. News, 169; Fed. Cas. 6,881.

129. An adjudication of bankruptcy *in invitum* is not conclusive evidence as against an execution creditor as to the allegations in the petition for adjudication found to be true by such decree. In re Dunkle et al., 7 N. B. R. 72; Fed. Cas. 4,160.

130. Section 30, act of 1789 (1 Stat. 88), authorizing testimony in the United States court to be taken *de bene esse*, and the act of 1817, conferring power to take testimony (3 Stat. 350), and of 1872 (17 Stat. 89), before commissioners of the circuit court, do not apply to proceedings in bankruptcy. In re Dunn et al., 9 N. B. R. 487; Fed. Cas. 4,173.

131. Execution was issued upon the decree of a state court against a guardian and

his surety, establishing a lien upon the personal estate of the latter, and steps were taken to elicit before a commissioner of chancery of the state court a disclosure of surety's estate. The surety subsequently filed his petition in bankruptcy and was adjudicated a bankrupt; after which he was arrested under an attachment issued by the commissioner of the state court to compel him to answer interrogatories. On petition for *habeas corpus* before the United States circuit court, *held*, that proceedings for discovery must be taken in the bankruptcy court. *Ex parte Taylor*, 16 N. B. R. 40; 1 Hughes, 617; 24 Pittsb. Leg. J. 205; Fed. Cas. 13,773.

132. On a trial of an action to recover property or its value, transferred contrary to section 35 of the act of 1867, it is necessary to prove a demand and refusal, and the same should be alleged in the complaint. *Brooke, Ass., v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

133. It must be proved by legal evidence that the facts set forth in the petition are true before a debtor can be brought into court to show cause against the same, or be in any manner disturbed in his affairs by reason of the filing of the petition. *In re Rogers*, 10 N. B. R. 444; 1 Cent. Law J. 470; Fed. Cas. 12,008.

134. A certificate of discharge is conclusive evidence in favor of the bankrupt of the fact and regularity of the discharge, but it is not conclusive evidence, in favor of other parties seeking to use it. *Dewey v. Moyer*, 18 N. B. R. 114.

135. It is the right of the alleged bankrupt, upon a motion to dismiss by either party, to have an order for the examination before the register of the party who verified the petition, and either party may bring in affidavits or evidence before the court. *In re Scammon*, 11 N. B. R. 280; 6 Biss. 195; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 12,429.

136. It is *prima facie* evidence of fraud for an insolvent debtor to make a transfer of property outside of the usual course of business. *Webb, Ass., v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

137. A discharge by a bankruptcy court having jurisdiction, when properly pleaded

in bar in a state court, is conclusive and cannot be attacked for fraud. *Hudson et al. v. Bingham et al.*, 8 N. B. R. 494.

138. It is sufficient proof of reasonable cause that bankrupt intended to prefer creditor if at the time of receiving the preference he had cause to believe debtor insolvent, and that the debtor knew of his insolvency. *Stobaugh, Ass., v. Mills et al.*, 8 N. B. R. 361; 5 Chi. Leg. News, 526; Fed. Cas. 13,461.

139. Certain notes having been purchased from a bankrupt after petition was filed, the court ordered that notes and guaranties thereon be preserved, that they may be used in evidence if required in proceedings against guarantee. *In re Lake*, 6 N. B. R. 542; 3 Biss. 204; 6 West. Jur. 360; 4 Chi. Leg. News, 281; Fed. Cas. 7,992.

140. An obligation given by an officer of a corporation, signing his own name with his official position, may be shown by parol evidence to be the obligation of the corporation. *In re Southern Minn. R. R. Co.*, 10 N. B. R. 86; Fed. Cas. 13,188.

141. Where premises under lease are condemned by a railroad company, and damages paid to the tenant upon the basis that he is to pay rent during the term, the landlord on the bankruptcy of the tenant will be allowed to prove the unpaid instalments of rent against the estate. *In re Clancy*, 10 N. B. R. 215; Fed. Cas. 2,782.

142. Where a conveyance was given to secure a pre-existing debt admittedly incurred outside of the ordinary business of the debtor, such fact is *prima facie*, and if uncontroverted, sufficient, evidence to establish reasonable knowledge on the part of the mortgagee of the debtor's insolvency. *Tuttle v. Truax*, 1 N. B. R. 169; Fed. Cas. 14,277.

143. Where a creditor has before him what the statute declares shall be *prima facie* evidence of fraud, he must be deemed to have reasonable cause to believe the existence of such fraud. *In re Kingsbury*, 3 N. B. R. 84; Fed. Cas. 7,816.

144. The marshal's return of service of notice to creditors is conclusive until rebutted by proof *aliunde*, but if it appears on its face that due service has not been made the first meeting must be adjourned. *In re Pulver*, 1 N. B. R. (8 vo. ed.) 46.

**EXAMINATION OF BANKRUPT.****I. WHO ENTITLED TO.****II. SCOPE.**

- (a) *Wife's Property.*
- (b) *Incriminating Questions.*
- (c) *General.*

**III. HOW APPLIED FOR.****IV. WHEN EXAMINATION MAY BE HAD.**

- (a) *In General.*
- (b) *After Discharge or Composition.*

**V. ADJOURNMENT.****VI. BANKRUPT'S RIGHT TO COUNSEL.****VII. FAILURE TO ATTEND.****VIII. REFUSAL TO ANSWER.****IX. IN GENERAL.**

See ATTORNEY, 5; COMPOSITION, 108; COURTS, 100; DISCHARGE, 79, 817; EVIDENCE, 42, 43; PETITION, 89; REFEREE, 4.

**I. WHO ENTITLED TO.**

1. Creditors whose claims have been protested against, if duly proved, will be entitled to an order for the examination of the bankrupt. In re Belden et al., 4 N. B. R. 57; Fed. Cas. 1,241.

2. A creditor has a right to examine a bankrupt, unless his debt is barred by the statute of limitations throughout the United States. In re Ray, 1 N. B. R. (8 vo. ed.) 203.

3. The act of 1867 entitled any creditor to an order for the examination of the bankrupt. The fact that one creditor has examined the bankrupt is not a reason for withholding the privilege from another creditor. In re Vogel, 5 N. B. R. 398; Fed. Cas. 16,984.

4. A creditor may be entitled to an order for the examination of a bankrupt notwithstanding the election of a trustee and committee of creditors under the forty-third section, which section does not confine the power of the court to order an examination to the application of the trustee (1867). In re Cooke & Co., 10 N. B. R. 126; Fed. Cas. 3,168.

5. A creditor opposed to a composition may examine the alleged bankrupt touching the question of the best interest of the creditors at the second meeting in composition, and the alleged bankrupt may be directed to produce his books and papers for use in

the examination. In re Ash, 17 N. B. R. 19; Fed. Cas. 571.

6. The fact that one creditor has examined the bankrupt generally touching his bankruptcy is not ground for withholding the privilege from any other creditor applying therefor. In re Adams, 2 N. B. R. 92; 8 Ben. 7; 86 How. Pr. 270; 1 Chi. Leg. News, 107; Fed. Cas. 40.

7. A bankrupt may be examined by the creditor, notwithstanding such creditor failed to appear upon the day fixed for such examination, or a day appointed for that purpose thereafter. In re Robinson et al., 2 N. B. R. 162; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 11,942.

8. A bankrupt agreed to produce his books and submit to a more thorough examination of his accounts, which he did. He was questioned by his counsel and explained matters not made clear at a former examination. *Held*, that he did not exceed his privileges, and that he should not be charged with the fees of the register for taking this part of the examination. In re Noyes, 11 N. B. R. 111; 2 Lowell, 352; Fed. Cas. 10,370.

**II. SCOPE.****(a) *Wife's Property.***

9. A bankrupt will be required to answer questions touching the property of his wife and his connection therewith, although such questions relate to a time prior to the creation of the debt of the creditor in whose behalf the inquiry is made. In re Craig, 4 N. B. R. 26; 3 Ben. 353; Fed. Cas. 3,322.

10. A bankrupt, on his examination, declined answering questions relative to his wife's property. *Held*, that the same were pertinent and proper. In re Craig, 4 N. B. R. 50; Fed. Cas. 3,323.

11. Where the wife of a member of a bankrupt firm claims certain estates standing in her name, the bankrupt may be examined as to what property the wife owns, and the amount of money that she had at any time. In re Clark et al., 4 N. B. R. 70; Fed. Cas. 2,805.

12. A large interest in an incorporated company had been conveyed to the wife of a bankrupt by persons interested in the suc-

cess thereof, and to which the services of the bankrupt were deemed to be of especial value. *Held*, that creditors had a right to examine the bankrupt fully touching the transaction for the purpose of establishing an equitable interest therein in his assignee. In re Bone-steel, 2 N. B. R. 106; Fed. Cas. 1,628.

13. An order for the examination of the wife of a bankrupt will be made when a *prima facie* case is made out by affidavit, that she has or had in her possession property which should have been surrendered to her husband's creditors, or has actively participated in other fraud upon the statute; and when she professes to be a creditor to her husband's estate, if she offers her debt for proof, she can be fully examined in regard to it like any other creditor. In re Gilbert, 3 N. B. R. 37; 1 Lowell, 340; Fed. Cas. 5,410.

#### (b) *Incriminating Questions.*

14. Upon his examination a bankrupt may decline to answer, if by so doing he would incriminate himself. In re Koch, 1 N. B. R. 153; 1 Amer. Law T. Rep. Bankr. 121; 15 Pittsb. Leg. J. 531; Fed. Cas. 7,916.

15. Where a bankrupt refused to answer certain questions on the ground that they would criminate or degrade him, *held*, that he must answer. In re Richards, 4 N. B. R. 25; 4 Ben. 303; Fed. Cas. 11,769.

#### (c) *In General.*

16. All questions which on their face relate to property that does not belong to the bankrupt are irrelevant. In re Van Tuyl, 1 N. B. R. 193; 1 Amer. Law T. Rep. Bankr. 123; Fed. Cas. 16,880.

17. Other creditors have no right to interpose objections to questions by one creditor to bankrupt. Questions relating to transactions between witness and bankrupt must be answered. In re Stuyvesant Bank, 7 N. B. R. 445; 6 Ben. 33; Fed. Cas. 13,583.

18. Under section 4 of the act of 1867, the taking of the direct examination of a witness was a service rendered for and required by the party calling such witness, and the taking of the cross-examination of such witness was a service rendered for and required by the parties cross-examining such witness.

Schofield v. Moorhead, 2 N. B. R. 1; Fed. Cas. 12,510.

19. Upon the examination of a bankrupt he testified that since the filing of the petition in bankruptcy he had acquired certain property and transacted certain business, but refused to state the nature and character thereof when questioned. *Held*, that the question as to the nature and character thereof was improper. In re Rosenfield, 1 N. B. R. 60; 15 Pittsb. Leg. J. 245; 1 Amer. Law T. Rep. Bankr. 47; Fed. Cas. 12,059.

20. A bankrupt cannot be examined as to property acquired or business done after the date of filing of the petition in bankruptcy, provided he states that the same has no connection with his estate or business prior to said date. *Id.*

21. A bankrupt, under the advice of counsel, must take the risk of deciding whether he will answer or not. *Id.*

22. Upon the examination of the bankrupt it was offered to be shown by the counsel for the creditors that a certain debt was fraudulently contracted by the bankrupt. It was objected that it was not competent to show this, and the matter was certified to the court. It was held that the register should take and report all testimony required. In re Koch, 1 N. B. R. 153; 1 Amer. Law T. Rep. Bankr. 121; 15 Pittsb. Leg. J. 531; Fed. Cas. 7,916.

23. The examination of a debtor at a composition meeting must be only such as will be in furtherance of the purpose of arriving at a true exhibit of the debtor's affairs. On objection of a creditor, no vote can be taken on a proposition of compromise until the examination of the debtor is completed. Upon demand of a creditor, the debtor must produce his books. In re Holmes & Lissberger, 12 N. B. R. 86; 8 Ben. 74; Fed. Cas. 6,632.

24. As to all matters concerning his estates a bankrupt is a competent witness; and no objection can lie to his testimony save to its credibility. In re Campbell, 17 N. B. R. 4; 8 Hughes, 276; Fed. Cas. 2,343.

25. A register has no power to pass upon the materiality or relevancy of questions asked in examinations before him. In re Bond, 3 N. B. R. 2; Fed. Cas. 1,618.

26. The duty of a bankrupt is to disclose whatever may concern any parties inter-



ested to know in reference to his debts, business or estate. In re Cook & Co., 10 N. B. R. 126; Fed. Cas. 3,168.

### III. HOW APPLIED FOR.

27. An order for bankrupt or his wife to be examined is in nature of a summons. In re Bellamy, 1 N. B. R. (8 vo. ed.) 64.

28. Where an order for examination of bankrupt was asked by certain creditors, the application for said order being neither in writing nor under oath, and the bankrupt had previously applied for his discharge, *held*, that the register, in the exercise of his discretion, could grant the order without requiring a petition or affidavit duly verified showing cause of granting same; and that the time to examine the bankrupt does not expire with the making of his application for discharge. In re Solis, 4 N. B. R. 18; 4 Ben. 148; Fed. Cas. 13,165.

29. It is not necessary to give notice to bankrupts of time and place of examination of witnesses, and the same can be proceeded with without reference to examination by creditors. In re Levy, 1 N. B. R. 66; 2 Ben. 169; Fed. Cas. 8,297.

30. An order was made by the register for the examination of one of the bankrupts, reciting that it was made on the application of F. & Co., a party claiming to be interested in the estate. The bankrupt objected on the ground that the register had no power to make such an order, that the order should have been made only on a verified application in writing, and that the order did not purport to be "on the application of a creditor" who had proved his claim. *Held*, that the order was correct in form and was properly issued. In re Vetterlein, 4 N. B. R. 194; 5 Ben. 7; Fed. Cas. 16,926.

31. After service of petition and the orders in the case, an alleged bankrupt is liable to examination to ascertain what disposition he has made of his property, and, if he be in court on his own behalf, no other notice is necessary than the motion for examination made in his presence, and he cannot claim the protection of the court on the ground that his answers will criminate himself, or tend to prove him guilty of a fraudulent concealment or disposition of his property. In re Bromley & Co., 8 N. B. R. 169.

32. A creditor who had duly proved his claim applied verbally for an order for the examination of a bankrupt. *Held*, that the order could only be granted when applied for by petition or affidavit, *duly verified*, showing good cause therefor. In re Adams, 2 N. B. R. 33; 2 Ben. 503; 36 How. Pr. 51; Fed. Cas. 39.

33. An application for an order for the examination of a bankrupt before the register need show no cause therefor, nor be verified by affidavit. In re McBrien, 2 N. B. R. 73; 2 Ben. 513; Fed. Cas. 8,665.

34. A special application to the judge of the bankruptcy court for an order for the examination of the bankrupt by creditors need not be sustained by a certificate of the register as to the propriety therefor. In re Brandt, 2 N. B. R. 109; Fed. Cas. 1,818.

### IV. WHEN EXAMINATION MAY BE HAD.

#### (a) *In General.*

35. The bankrupt has a right to be protected against unreasonable demands for further examination, and a subsequent application for examination may properly be denied, unless the first examination was collusive or deficient in material and specified particulars. In re Frisbie, 13 N. B. R. 349; Fed. Cas. 5,131.

36. Register has power to make an order requiring witness or bankrupt to appear and be examined. On such examination witness may be examined as fully as under a reference upon a creditor's bill. In re Pioneer Paper Co., 7 N. B. R. 250; Fed. Cas. 11,178.

37. It is the duty of the debtor to be ready for examination upon due notice, but he need not notify the creditor when and where examination is to be had. In re Suttlefield, 3 N. B. R. (8 vo. ed.) 13; 1 Lowell, 331; 2 Amer. Law T. 122; Fed. Cas. 8,398.

38. The specifications filed in opposition to a discharge being held irregular, ten days were allowed in which to amend. When presented amended, the creditors asked for an examination of the bankrupt. Abundant time had been accorded for the examination in regular course, but none was made. No showing by affidavit was made to support the request for an examination, and it was

denied. In re Isidor and Blumenthal, 1 N. B. R. 83; 2 Ben. 123; Fed. Cas. 7,105.

39. Where the examination of a bankrupt under a previous order has been abruptly terminated by non-attendance of assignee's counsel, and an order for a new examination was taken by assignee, *held*, that the bankrupt is required to submit to the examination. In re Van Tuyl, 2 N. B. R. 25; Fed. Cas. 16,881.

40. A bankrupt in attendance at a meeting to show cause against his discharge may be required by the register to submit to an examination upon oath touching his bankruptcy by a creditor. In re Brandt, 2 N. B. R. 76; Fed. Cas. 1,812.

41. When a bankrupt appears before the register to take and subscribe to the final oath, he may be examined by any creditor, or by the assignee in the interest of creditors, with the view to showing that the requirements of the act, or some one of such requirements, have not been conformed to, but the creditor will be required to pay for any services rendered at his request which are not required to be performed if no creditor appears. In re Jackson, 8 N. B. R. 424; Fed. Cas. 7,128.

42. On petition in bankruptcy filed, an order was granted for the examination of the debtor prior to adjudication. On review of the competency of the court to grant such order, *held* competent, but that such examination should only be allowed in furtherance of justice and to protect the rights of creditors. In re Salkey et al., 9 N. B. R. 107; 5 Biss. 486; 6 Chi. Leg. News, 69; 2 Amer. Law Rec. 502; 21 Pittsb. Leg. J. 56; Fed. Cas. 12,252.

43. So long as a creditor's debt stands proved and unimpeached, a claim made by the bankrupt before the register that any indebtedness that ever existed from him to said creditor was offset and extinguished by a counter-indebtedness furnishes no ground for a refusal on the part of the bankrupt to be sworn and examined on the application of such creditor. In re Kingsley, 7 N. B. R. 558; 6 Ben. 300; Fed. Cas. 7,818.

44. In examination proceedings the debtor was examined in writing at sundry adjournments of the meeting. The debtor objected to its continuance, and his objection was

sustained. In re Proby, 17 N. B. R. 175; 13 Amer. Law Rev. 598; 17 Alb. Law J. 167; Fed. Cas. 11,439.

45. The register has not the power, by an announcement beforehand, to fix a limit of time within which the examination of the debtor must be concluded, without regard to the nature of questions sought to be put or the interest with which propounded. In re Tift, 17 N. B. R. 421; Fed. Cas. 14,036.

46. Where a bankrupt gave a cause for refusing to be further examined, and by a vote sufficient to pass the resolution of composition the creditors decide the cause is satisfactory, the vote is sufficient. In re Tift, 17 N. B. R. 502; Fed. Cas. 14,029.

47. A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud. In re Rosenfield, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618; 1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,058.

48. After the first meeting of creditors an order was made for the examination of the bankrupt by a certain creditor, the date whereof was several times adjourned. The bankrupt finally obtained an order to show cause why he should not be discharged, when said creditor filed his objections, to which the attorney for the bankrupt objected. An examination was allowed. In re Seckendorf, 1 N. B. R. 185; 2 Ben. 462; 15 Pittsb. Leg. J. 450; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 12,600.

#### (b) *After Discharge or Composition.*

49. A bankrupt is not required to submit to an examination under section 26 after he has been discharged in bankruptcy, unless the discharge is set aside under section 34 (1867). In re Jones, 6 N. B. R. 386; Fed. Cas. 7,449.

50. After the discharge is granted, the bankrupt cannot by summary order be required to submit to an examination touching property alleged to have been concealed or fraudulently transferred. In re Dole, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,965; In re Dole, 9 N. B. R. 193; 11 Blatchf. 499; Fed. Cas. 3,964.

51. The fact that the bankrupt has received his discharge more than two years before is not a good objection to his being

examined in accordance with the twenty-sixth section of the act of 1867. In *re* Heath et al., 7 N. B. R. 448; Fed. Cas. 6,804.

52. After a bankrupt's discharge the register cannot order him to appear and submit to an examination touching his acts and business prior to adjudication. In *re* Dean, 3 N. B. R. 288; Fed. Cas. 3,701.

53. A creditor who had proved his debt applied for an examination of the bankrupt. This was opposed on the ground that a resolution of composition had been adopted and confirmed by the requisite number of creditors. *Held*, that the creditor's right to examine the bankrupt was suspended. In *re* Tift, 18 N. B. R. 177; Fed. Cas. 14,032.

#### V. ADJOURNMENT.

54. The examination may be adjourned beyond the return day of the order to show cause. In *re* Mawson, 1 N. B. R. 40; 1 Amer. Law T. Rep. Bankr. 46; Fed. Cas. 9,320.

55. An order for creditors to show cause in opposition to a discharge, being returnable on a certain date, the bankrupt appeared and the counsel for the creditors requested an adjournment on the ground that an examination of the bankrupt was in progress under order of the court. An adjournment was ordered. In *re* Thompson, 1 N. B. R. 65; 2 Ben. 166; Fed. Cas. 18,935.

See also IV, (a), *supra*.

#### VI. BANKRUPT'S RIGHT TO COUNSEL.

56. In the examination of a bankrupt he may not consult with his counsel before answering interrogatories, except by permission of the register. In *re* Collins, 1 N. B. R. 153; 2 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 8,008.

57. The examination of a bankrupt is an examination in open court upon the trial of the cause and must be an oral examination. It is in the discretion of the court to allow the bankrupt counsel on such examination. In *re* Judson, 1 N. B. R. 82; 2 Ben. 210; 35 How. Pr. 15; 1 Amer. Law T. Rep. Bankr. 129; Fed. Cas. 7,562.

58. The counsel for a creditor propounded a question to the bankrupt under examination and required a direct answer. The counsel for the bankrupt claimed the right

to assist the bankrupt in his answer. It was held that the bankrupt might be examined the same as a witness in any cause on trial in the district court, but he cannot consult with counsel. *Id*.

59. A bankrupt, on examination, may be cross-examined by his own counsel. In *re* Leachman, 1 N. B. R. 91; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 8,157.

60. A bankrupt should have every proper facility upon examination for refreshing his recollection and making true and careful answer. He may, when necessary, consult books, papers, and even counsel when the examining magistrate sees good cause for allowing it. In *re* Tanner, 1 N. B. R. 59; 1 Lowell, 215; 15 Pittsb. Leg. J. 244; 35 How. Pr. 20; 1 Amer. Law T. Rep. Bankr. 131; Fed. Cas. 13,745.

61. The register must determine, according to the circumstances of the case, whether or not a bankrupt shall be allowed to consult his counsel during his examination. In *re* Lord, 3 N. B. R. 58; Fed. Cas. 8,502.

#### VII. FAILURE TO ATTEND.

62. Where an order of examination was not served within the district, the court has no authority to arrest the bankrupt in another district for contempt in not appearing to answer such process. In *re* Hodges, 11 N. B. R. 369; Fed. Cas. 6,562.

63. A bankrupt was required to show cause why he should not be in contempt for not appearing to be examined under section 26. He replied that before the order was issued he had been discharged. The proceedings for contempt were dismissed (act of 1867). In *re* Jones, 6 N. B. R. 386; Fed. Cas. 7,449.

64. A bankrupt who has been ordered to submit himself to further examination at a specified time and departs from the district before the time arrives will not be discharged until he has submitted to such examination. In *re* Kingsley, 16 N. B. R. 301; Fed. Cas. 7,820.

65. The failure of a bankrupt's wife to attend and submit to an examination as a witness in the bankruptcy proceedings as required by the register's order is sufficient to prevent the discharge of the bankrupt, unless he shall prove to the satisfaction of the

court that he was unable to procure her attendance. *In re Van Tuyl*, 2 N. B. R. 177; 8 Ben. 287; 1 Chi. Leg. News, 326; Fed. Cas. 16,879.

### VIII. REFUSAL TO ANSWER.

See COURTS, 100; EVIDENCE, 42, 43.

66. Where it appears that bankrupts purchased a large amount of goods before their failure, kept no record of the manner in which they disposed of them, and, when interrogated before the register, said they could give no account of the matter, the district court has power to imprison them for a refusal to make such answer as will account for the disappearance of the property. *In re Salkey et al.*, 11 N. B. R. 516; 6 Biss. 280; 7 Chi. Leg. News, 195; Fed. Cas. 12,254.

67. If a creditor chooses, he can, upon refusal of a bankrupt to answer, apply to the district judge to punish the party as for contempt of court, and upon such application the judge will decide whether or not the question is a proper one. *In re Rosenfield*, 1 N. B. R. 60; 15 Pittsb. Leg. J. 245; 1 Amer. Law T. Rep. Bankr. 47; Fed. Cas. 12,059.

68. A witness cannot object to be examined in any matters in application made and filed for his examination which shall be within the subjects mentioned in section 26 of the bankrupt act. *In re Blake*, 2 N. B. R. (8 vo. ed.) 8; Fed. Cas. 1,492.

69. By submitting objection to examination to register's decision, bankrupt waives the right to have the question adjourned into court. *In re Patterson*, 1 N. B. R. (8 vo. ed.) 100.

### IX. IN GENERAL.

70. A motion for confirmation of a composition was opposed by two creditors on the ground that at the first meeting one of the debtors was excused from examination, on account of illness, by vote of the creditors. *Held*, that the objection was frivolous. *In re Wilson et al.*, 18 N. B. R. 300; Fed. Cas. 17,785.

71. When the examination of a bankrupt is desired in respect to the hearing of a motion to expunge proof of a claim, he should be summoned as a witness. *Canby, Ass. v. McLearn*, 13 N. B. R. 22; Fed. Cas. 2,378.

72. The question whether an examination

incompleted can be used against the bankrupt is not one properly arising in the course of his examination, and must be answered by the judge before whom the examination may be offered, if offered in its incomplete condition. *In re Noyes*, 11 N. B. R. 111; 2 Lowell, 352; Fed. Cas. 10,370.

73. A witness may be examined in regard to property in which the bankrupt may possibly have an interest, and as to any property that the bankrupt owned or had a right, title or interest to or in at the time of the filing of his petition in bankruptcy. *In re Dole*, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,963.

74. After the filing by creditors of specifications in opposition to application of bankrupt for a discharge, no further examination of the bankrupt can be had before the register. Further examination must proceed under section 26 (act of 1867). *In re Frizelle*, 5 N. B. R. 119; Fed. Cas. 5,132.

75. The examination of a bankrupt upon an order issued by the register before whom the petition is pending may be had before such register. *In re Lanier*, 2 N. B. R. 59; Fed. Cas. 8,070.

76. In investigations in bankruptcy proceedings, the bankrupt occupies the position of a witness, and therefore his counsel may cross-examine him, or he may appear as a witness in his own behalf, the examination being confined to the issue made by the pleadings. *In re Witkowski*, 10 N. B. R. 209; Fed. Cas. 17,920.

77. A bankrupt when ordered to appear for examination in reference to his bankruptcy is not entitled to any fees or compensation. *In re McNair*, 2 N. B. R. 77; Fed. Cas. 8,907.

78. Upon the question whether the bankrupt has made a full disclosure in accordance with an order requiring it, if application is made to review the decision of the district court, the court must be satisfied by the petitioner that the report of the bankrupt is such as a reasonable man could not credit. *In re Mooney et al.*, 15 N. B. R. 456; 14 Blatchf. 204; Fed. Cas. 9,748.

79. The bankrupt is not entitled to witness fees on appearance for examination. *In re Okell*, 1 N. B. R. 52; 2 Ben. 144; 3 Pittsb. Leg. J. (N. S.) 232; Fed. Cas. 10,474.

80. In examination of bankrupt by creditors register will pass upon questions objected

to, and objection being made and exception taken, he will at close of testimony entertain motion to strike out answers or admit excluded questions and certify to court. *In re Lyon*, 1 N. B. R. (8 vo. ed.) 111.

## EXCHANGE.

See PREFERENCE, 239.

## EXECUTION.

### I. PRIOR TO BANKRUPTCY PROCEEDINGS.

### II. AFTER COMMENCEMENT OF PROCEEDINGS.

### III. WHETHER A PREFERENCE.

### IV. LIEN.

### V. IN GENERAL.

See COMPOSITION, 82; ESTATES, 4, 21; EXEMPTIONS, 47; INJUNCTION, 1; SALES, 89; SHERIFF, 7; TRUSTEES, 207.

### I. PRIOR TO BANKRUPTCY PROCEEDINGS.

1. The possession of goods by a sheriff obtained by an execution on final judgment levied prior to proceedings in bankruptcy cannot be disturbed by an assignee; he being entitled only to the balance remaining in the sheriff's hands after satisfaction of his execution. *Marshall v. Knox et al.*, 8 N. B. R. 97; 16 Wall. 551.

2. Where, by the local law, the execution is a lien upon all the personal property of the defendant from the time it reaches the sheriff's hands, the right of an execution creditor, upon an execution issued before the commencement of proceedings in bankruptcy, is paramount to the assignee in bankruptcy, and will control the fund as against general creditors. *In re Weamer*, 8 N. B. R. 527.

3. Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing in any stage of them after the execution of the assignment. *In re Hafer et al.*, 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 164; Fed. Cas. 5,897.

4. Executions issued on judgments entered on warrants signed and delivered a year before bankruptcy proceedings are valid and hold property unless debtor actively in-

terfered to have seizures made. *Shiner, Ass., v. Huber et al.*, 19 N. B. R. 414; 14 Phila. 402; 36 Leg. Int. 339; 8 Reporter, 393; Fed. Cas. 12,787.

5. A petition in bankruptcy does not render void an honest execution, levied upon the debtor's property before the filing of his petition. The court will interfere with the exercise of the right of the sheriff only where its exercise would materially affect the interest of the general creditors. *Goddard v. Weaver*, 6 N. B. R. 440; Fed. Cas. 5,495.

6. A sale of the property of a bankrupt under an execution upon a judgment rendered before the adjudication in bankruptcy is valid, although the judgment creditors knew at the time the execution was issued that the debtor was insolvent. *In re Kerr*, 2 N. B. R. 124; 2 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 7,728.

### II. AFTER COMMENCEMENT OF PROCEEDINGS.

7. The fact that creditors levied on property of the alleged bankrupt after the filing of the petition gives them no rights as against petitioning creditors different from that of creditors at large. *In re Lawrence et al.*, 18 N. B. R. 516; 10 Ben. 4; 26 Pittsb. Leg. J. 143; Fed. Cas. 8,133.

### III. WHETHER A PREFERENCE.

8. Where an execution must necessarily stop the debtor's business, the execution creditor in general has reason to believe the debtor insolvent, and in general intends what would be a fraud on the provisions of the bankrupt act. *Hood et al v. Karper et al.*, 5 N. B. R. 358; 8 Phila. 160; 28 Leg. Int. 340; Fed. Cas. 6,664.

9. Procurement to take in execution may be inferred from such relationship between the debtor and creditor and apparent concert of action on their part as would ordinarily be incompatible with any other intention on the part of the debtor than that of giving a preference to the creditor. *In re Dunkle and Dreisbach*, 7 N. B. R. 72; Fed. Cas. 4,160.

10. A creditor, believing his debtor to be insolvent, brought suit and caused execution to be issued and levy to be made on the property of his debtor. *Held*, that there was no

preference, and that creditor might have alleged this as an act of bankruptcy and demanded an adjudication. *Coxe v. Hale*, 8 N. B. R. 562; 10 Blatch. 56; 21 Pittsb. Leg. J. 77; Fed. Cas. 3,810.

11. When an insolvent debtor suffered his property to be seized and sold on execution by a creditor who had reason to believe the debtor insolvent within four months, the assignee can recover the value of the property from the creditor. *Christman v. Hayner*, 8 N. B. R. 528; Fed. Cas. 2,703.

12. An execution creditor, knowing that his debtor was unable to pay his debts at maturity, is chargeable with notice, and cannot prove his debt until he surrenders his preference. *In re Forsyth*, 7 N. B. R. 174; Fed. Cas. 4,948.

13. Creditors who have reason to believe their debtor insolvent will not be allowed to obtain a preference over other creditors by procuring judgment and levy. *Wilson, Ass., v. Brinkman*, 2 N. B. R. 149; 1 Chi. Leg. News, 193; Fed. Cas. 17,794.

#### IV. LIEN.

14. Notwithstanding a return of *nulla bona* on a writ of execution, a judgment creditor may show that there was, during the life of the execution, personal property which the constable might have seized. *In re Tills & May*, 11 N. B. R. 214; Fed. Cas. 14,052.

15. The seizure of goods under a warrant of seizure by the United States marshal, where an adjudication of bankruptcy has been had upon a creditor's petition, will divest the lien of a prior unlevied execution. *Id.*

16. A levy of an execution made by indorsing the levy upon the writ, placing a custodian in charge of the goods, and receiving a key to the store in which the goods are kept, is a good levy, and the execution creditors are entitled to be paid the amount of their claim out of the proceeds arising from the sale of the goods afterwards taken by the marshal in bankruptcy. *In re Hughes et al.*, 11 N. B. R. 452; 7 Chi. Leg. News, 162; Fed. Cas. 6,843.

17. It is well settled that, where property is held by a sheriff by virtue of a levy under an execution, when another execution is placed

in his hands no new levy is needed. *In re Hull*, 18 N. B. R. 1; 14 Blatchf. 257; Fed. Cas. 6,857.

18. A sale by virtue of an execution issued and levied upon the filing of the petition in bankruptcy will not pass title against the assignee, although the judgment was entered and lien created prior to the bankruptcy. *Davis, Ass., v. Anderson*, 6 N. B. R. 145; Fed. Cas. 3,623.

19. Levy must be in conformity with the law of the forum or it will be declared void upon petition of the assignee. *Beers, Ass., v. Place & Co. et al.*, 4 N. B. R. 150; 36 Conn. 578; Fed. Cas. 1,233.

20. Creditors issuing execution against property of debtors whom they have no reason to believe insolvent obtain valid liens. *In re Black et al.*, 2 N. B. R. 65; Fed. Cas. 1,458.

21. An execution valid by the law of the forum must be paid out of the proceeds in full. *In re Weeks*, 4 N. B. R. 116; 2 Biss. 259; Fed. Cas. 17,350.

22. When there is no dispute as to the validity of a judgment under which executions issued and levy made, execution creditors are entitled to be paid out of the proceeds. *Swope v. Arnold*, 5 N. B. R. 148; Fed. Cas. 13,702.

#### V. IN GENERAL.

23. Where a debtor was adjudicated a bankrupt and surrendered by his bail, his arrest under an alias execution issued by a state court was not a new arrest but a continuance of the former arrest. *In Hazleton*, 2 N. B. R. 12; 1 Lowell, 270; 1 Amer. Law T. Rep. Bankr. 105; Fed. Cas. 6,287.

24. Where execution has issued and levy been made on the property of a debtor sufficient to satisfy the judgment, the creditor is not estopped from proceeding in bankruptcy against the debtor; but such proceeding will be held to be a waiver of the levy. *In re Sheehan*, 8 N. B. R. 345; Fed. Cas. 12,737.

25. A sheriff, on an execution from state court, collected from the defendant amount due on a *fi. fa.* and was eight days afterwards, by an injunction from the United States district court, wherein proceedings were commenced in bankruptcy against the debtor,

enjoined from interfering with or disposing of the "bankrupt's property." *Held*, this injunction was a sufficient answer for the sheriff to make to an order from the plaintiff requiring him to pay over the money. *Mills et al. v. Davis et al.*, 10 N. B. R. 340.

26. Where an execution creditor has been enjoined in aid of the proceedings in bankruptcy, he may, if he so elects, have his claim of priority of payment out of the funds (proceeds of sales of property upon which his execution is alleged to have been a lien) determined at general meeting of creditors. *In re Dunkle and Driesbach*, 7 N. B. R. 72; *Fed. Cas.* 4,160.

27. Where, under an agreement of the execution creditor, the property levied on passes into the possession of the assignee without prejudice to such prior lien as may be sustainable, the assignee and register should expedite such decision. *In re Beck*, 1 N. B. R. 163; 6 Phila. 475; *Fed. Cas.* 1,205.

28. Where the court cannot approve the bond as proper in form, and the delay in filing has been more than ten days, the issuing of execution will not be stayed. *Benjamin, Ass., v. Hart*, 4 N. B. R. 138; 4 Ben. 454; *Fed. Cas.* 1,802.

29. An assignee can proceed in the federal court for the proceeds of sale under execution issued out of a state court when the judgment is alleged to be in fraud of the bankrupt act. *Traders' Nat. Bank of C. v. Campbell, Ass.*, 6 N. B. R. 353; 14 Wall. 87.

## EXECUTORS.

See CLAIMS, 145; COURTS, 164; MORTGAGES, 25; PLEADING AND PRACTICE, 201.

Executor appointed, by will, for the limited purpose of winding up testator's banking business is not one of the class of executorships designed to be administered under the bankrupt act. *Graves et al. v. Winter et al.*, 9 N. B. R. 357; 6 Chi. Leg. News, 284; 1 Cent. Law J. 178; 21 Pittsb. Leg. J. 159; *Fed. Cas.* 5,710.

## EXEMPTIONS.

### I. CONSTITUTIONALITY.

### II. TITLE.

### III. IN GENERAL.

### IV. HOMESTEAD.

- (a) *When Allowed.*
- (b) *When Not Allowed.*
- (c) *Head of Family.*
- (d) *Waiver.*
- (e) *Miscellaneous.*

### V. PERSONALTY.

- (a) *When Allowed.*
- (b) *When Not Allowed.*

### VI. LIENS.

### VII. PARTNERSHIP PROPERTY.

See CONVEYANCES, 25, 61; COSTS AND FEES, 86; DISCHARGE, 278, 312; LIEN, 85; MORTGAGES, 60, 110; PARTNERS, 70; PREFERENCES, 3; SALES, 62; TRUSTEES, 17, 19.

## I. CONSTITUTIONALITY.

1. The intrusting of the "subject" of bankruptcies to congress carries with it the power of defining what, and how much, of the debtor's property shall be exempt from the claim of his creditors. *In re Reiman et al.*, 13 N. B. R. 128; 12 Blatchf. 563; *Fed. Cas.* 11,675.

2. The provision in the bankrupt act allowing the exemption given by the state laws, whether they are valid or not, is constitutional. *In re Smith*, 14 N. B. R. 295; 2 Woods, 453; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 315; 3 Cent. Law J. 386; 3 Am. Law T. Rep. (N. S.) 335; *Fed. Cas.* 12,996.

3. Laws exempting reasonable portions of the debtor's property from execution and sale properly relate to the remedy, and are therefore not liable to a constitutional objection. *In re Owens*, 12 N. B. R. 518; 6 Bias. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; *Fed. Cas.* 10,632.

4. The act of March 3, 1873, was held not unconstitutional on account of lack of uniformity or because it allowed exemptions greater in amount than existed when the contract on which the debt is based was made. *In re Kean et al.*, 8 N. B. R. 367; 2 Hughes, 322; 2 South. Law Rev. 725; 2 Amer. Law Rec. 230; *Fed. Cas.* 7,630.

5. If a bankrupt law provides that property exempt from execution shall be exempt from assignment in one state, it must so provide as regards all the states. *In re Deckart*, 10 N. B. R. 1; 3 Amer. Law Rec. 96; 1 Cent. Law J. 316, 320; 6 Chi. Leg. News, 310; 1 Amer. Law T. Rep. (N. S.) 336; 13 Amer. Law Rev. 736; *Fed. Cas.* 3,723.

6. A voluntary bankrupt claimed homestead exemptions under provisions of constitution and laws of Virginia and act of March 8, 1878. *Held*, that the amendment to the act was unconstitutional, as it destroyed uniformity thereof. *Id*.

7. The amendment of the bankrupt act of March 8, 1878, in respect to exempt property, is constitutional, and the exemptions allowed thereby are valid against debts of the bankrupt, without regard to the time when contracted, whether before or after the amendment, and also against liens by judgment or decrees of any state court. *In re Jordan*, 10 N. B. R. 427; *Fed. Cas.* 7,515; *In re Smith*, 8 N. B. R. 401; *Fed. Cas.* 12,986.

## II. TITLE.

8. No title to exempt property passes to the assignee by the assignment. It remains in the bankrupt, and at his death passes to his legal representatives. *In re Hester*, 5 N. B. R. 285; *Fed. Cas.* 6,437.

9. The bankrupt law neither directly nor indirectly transfers any of a bankrupt's exempt property to his family, but leaves him full control over it. *Farmer v. Taylor et al.*, 15 N. B. R. 515.

10. The title to property set apart to a bankrupt as exempt, when such exemption is unauthorized by law, passes to and remains in the assignee, and no exception need be taken to the report of the assignee making such unauthorized exemption, but his accounts may be excepted to for the omission therefrom of the value thereof. *In re Gainey*, 2 N. B. R. 163; *Fed. Cas.* 5,781.

11. An insolvent debtor purchased a wagon, team and harness with wheat for the express purpose of claiming the property as exempt. *Held*, that such transaction was void, and the title to the wheat passed to the assignee in bankruptcy. *In re Parker et al.*, 18 N. B. R. 43; 5 *Sawy.* 58; *Fed. Cas.* 10,734.

12. When an assignee sells to a third person property in which the bankrupt had title at the time of adjudication of bankruptcy, no other court can inquire whether such property was exempt from the assignment in bankruptcy. *Steele v. Moody*, 16 N. B. R. 558.

13. Suit was brought by a bankrupt on

a promissory note assigned to him as part of his exemption. *Held*, that the title to the note was in the plaintiff and he could bring the suit. *Henley v. Lanier*, 15 N. B. R. 280.

14. Certain real estate was allowed a bankrupt as exempt. The exemption law restricted the after-conveyance of such exempt property. The bankrupt afterward married, his first wife having died, and he and his second wife conveyed the realty away. The children by the first wife attacked the conveyance. *Held*, that while the bankrupt act adopts the local exemption laws as to amount, it does not recognize restrictions upon the debtor in his power to convey the exempt property. *Farmer v. Taylor et al.*, 15 N. B. R. 515.

15. Wife applied for exemptions, to which trustee objected on the ground that the husband was adjudged a bankrupt and all his property, including exemptions, passed into the hands of the marshal; also, because bankrupt had been allowed exemptions. Action in ejectment was brought against the bankrupt in possession, whose wife claimed homestead exemptions. Purchasers of the lands of bankrupt from the assignee had notice, at time, of portion set apart for wife and that the bankrupt husband was her tenant and that he was not discharged. *Held*, the taking of an exemption by bankrupt defeated wife's right to a homestead, and the purchaser at the assignee's sale got a good title as against wife and children. *Woolfolk v. Murray*, *Bryan v. Sims*, 10 N. B. R. 540; *Fed. Cas.* 18,028.

## III. IN GENERAL.

16. It is the duty of the bankruptcy court to see that the bankrupt's exempt property is secured to him. Property exempt by the laws of the state of the bankrupt's domicile is also exempt by the fourteenth section of the act of 1867. *In re Stevens*, 5 N. B. R. 298; 2 *Biss.* 373; 10 *Amer. Law Reg. (N. S.)* 523; *Fed. Cas.* 13,392.

17. A bankrupt is entitled to the exemptions allowed by the law of his domicile, although such exemptions may have been increased subsequent to the recovery of judgments against him. *In re Smith*, 8 N. B. R. 401; 6 *Chi. Leg. News*, 33; *Fed. Cas.* 12,986.



18. If it exists at all, the right of exemption must exist at the date of the institution of proceedings in bankruptcy. In re Duer-son, 18 N. B. R. 183; Fed. Cas. 4,117.

19. The disposing of property subject to execution for the purpose of investing the proceeds in or converting them into exempt property would not deprive the party of an exemption, so long as his property is really such as the statute requires. In re Booth-royd & Gibbs, 14 N. B. R. 223; Fed. Cas. 1,652.

20. Under act of 1867 a bankrupt was only entitled to the exemption allowed by the law of his domicile at the time of the passage of the act. In re Askew, 3 N. B. R. 142; Fed. Cas. 585.

21. While adopting the exemption laws of a state as part of the bankrupt law, congress cannot dispense with any of the limita-tions which that law imposes. In re Duer-son, 18 N. B. R. 183; Fed. Cas. 4,117.

22. A bankrupt who has not complied with the requirements of the state exemp-tion law is not entitled to the benefits thereof. In re Jackson et al., 2 N. B. R. 158; Fed. Cas. 7,127.

23. No specific property is set apart as an exemption, but the bankrupt may select such as he desires to have, and when selected it will be set apart. In re Solomon, 10 N. B. R. 9; 2 Hughes, 164; 3 Amer. Law Rec. 226; 1 Amer. Law T. Rep. (N. S.) 351; Fed. Cas. 13,166.

24. If the bankrupt fails to select exemp-tions before his estate is sold he thereby loses his right thereto. *Id.*

25. All property exempt from forced sale under the laws of the different states is saved to the bankrupt under the proviso in section 14 of the act of 1867. *Maxwell v. Mc-Cune et al.*, 10 N. B. R. 306.

26. As originally enacted, the bankrupt law exempted such property as was exempt from levy and sale under execution by the laws of the state where the bankrupt had his domicile at time of commencement of pro-ceedings. In re Deckert, 10 N. B. R. 1; 2 Hughes, 183; 3 Amer. Law Rec. 96; 1 Cent. Law J. 816, 320; 6 Chi. Leg. News, 310; 1 Amer. Law T. Rep. (N. S.) 336; 8 Amer. Law Rev. 786; Fed. Cas. 3,728.

27. The exemption under state laws is in addition to that allowed by the bankrupt

law, whether the state laws exempt specifi-cally or allow the debtor to select; but the assignee cannot set apart under the state laws any property specifically designated by the bankrupt act. In re Feeley, 3 N. B. R. 15; 15 Pittsb. Leg. J. (O. S.) 291; Fed. Cas. 4,714.

28. If the state law as to exemptions be changed during the year (1871), the exemp-tion can be allowed only according to the law in force at the close of that year. In re Baer, 14 N. B. R. 97; Fed. Cas. 723.

29. A bankrupt who received the exemp-tion allowed by the state laws at the enact-ment of the bankrupt act is entitled to an additional exemption allowed by a state con-stitution adopted subsequent thereto and prior to the amendatory act of 1872; and if the property out of which the exemption is claimed had been sold and the proceeds are in the hands of the assignee, he will be en-titled to receive out of such proceeds an amount equal to the additional exemption he would have been allowed had not the property been sold. In re Vogler, 8 N. B. R. 132; 2 Hughes, 297; Fed. Cas. 16,986.

30. A bankrupt had an expectant interest in an estate of less than \$300, which sum he was entitled to hold exempt from levy and sale under execution by the laws of the state in which he resided. *Held*, that he was en-titled to hold such expectant interest exempt. In re Bennett, In re Erben, 2 N. B. R. 66; 8 Amer. Law Reg. (N. S.) 34; 6 Phila. 472; 25 Leg. Int. 316; 1 Balt. Law Trans. 21; 1 Chi. Leg. News, 22; Fed. Cas. 1,315.

31. The acceptance by congress of a con-stitution of a state under "an act for the more efficient government of the rebel states" is not an amendment of the bankrupt act (1867) as respects an additional exemption therein provided for. In re McLean, 2 N. B. R. 173; Fed. Cas. 8,878.

32. A bankrupt, adjudged so in 1872, claimed certain exemptions under statutes of Virginia of 1871, amended by act of March, 1873, passed subsequent to liens of force ob-tained against his property. *Held*, that ex-emption only allowable as to judgments rendered after passage of amendment of 1873. In re Dillard, 9 N. B. R. 8; 2 Hughes, 190; 6 Amer. Law T. Rep. 490; 21 Pittsb. Leg. J. 83; Fed. Cas. 3,912.

33. Every bankrupt who is a householder in the state of Indiana is absolutely entitled, over and above his household and kitchen furniture and other articles and necessities to the amount of \$500, to retain free from all claims in favor of creditors, property, either personal or real, to the value of \$300. In re Cobb, 1 N. B. R. 106; 1 Amer. Law T. Rep. Bankr. 59; Fed. Cas. 2,920.

34. Petition was filed May 24, 1873. The assignee, on account of certain judgments in force against bankrupt, rendered in the state courts prior to July 21, 1868, refused to set apart other property than that allowed by the exemption laws of 1864. Bankrupt claimed exemptions allowed by the constitution and laws of the state as existing in the year 1871. Held, that bankrupt was entitled to exemptions claimed, and act of 1867 and amendatory acts of June 8, 1872, and March 8, 1873, held constitutional. In re Smith, 8 N. B. R. 401; 6 Chi. Leg. News, 38; 18 Int. Rev. Rec. 167; Fed. Cas. 12,986.

35. Where property of an insolvent is assigned with fraudulent preference, in an action brought by the assignee to recover the property, the value of property exempt from execution must be deducted and judgment entered up for the remainder. *Grow v. Ballard et al.*, 2 N. B. R. 69; Fed. Cas. 5,848.

36. The exemption of real and personal property to the appraised value of \$300, under the laws of Pennsylvania, to be selected by the bankrupt, is in addition to the exemption of such necessary and suitable articles, not exceeding in value \$500, as may be designated and set apart by the assignee, subject to the court's revision. In re Ruth, 1 N. B. R. 154 (8 vo. ed.).

#### IV. HOMESTEAD.

##### (a) *When Allowed.*

37. T. being bankrupt claimed exemption for himself and three children of Mrs. C., whom he had raised, though never, either by legislation or judicial decree, had Mrs. C. been awarded to him as legal heir; counsel for creditors objected to exemption of children of Mrs. C. and to exemption of T. on the ground that T. was not the head of a family. Register approved exemption as to T., but not as to children of Mrs. C. Decision affirmed

by the court. In re Taylor, 3 N. B. R. 39; Fed. Cas. 13,775.

38. A. purchased a tract of land a short distance from a town and occupied it as his homestead. Later the town was extended so that its limits included this property, and the land was divided by streets and alleys. A. became bankrupt, and the assignee allowed him as his homestead only that portion of the original tract remaining in one piece, on which his house stood. The court held that A. having acquired a rural homestead in accordance with the state laws, the extension of the city limits did not affect it. In re Young, 15 N. B. R. 205; 1 Tex. Law J. 7; Fed. Cas. 18,149.

39. By the Nevada constitution and laws the interest of a tenant in common, not exceeding \$5,000 in value, in the dwelling-house and land actually occupied by him as a homestead, is exempt. In re Swearinger et al., 17 N. B. R. 138; 5 Sawy. 52; Fed. Cas. 13,683.

40. Motion was made on the part of creditors to set aside an application for the allowance of a homestead exemption out of property incumbered by judgments upon debts created antecedent to the adoption of the constitution of North Carolina providing for the exemption. The motion was denied. In re Shipman, 14 N. B. R. 570; 2 Hughes, 227; Fed. Cas. 12,791.

41. Where the petition was filed subsequent to the passage of the act, or where it was filed prior thereto, but the assets of the bankrupt were in the hands of the court at the time of its enactment, the additional homestead exemptions will be allowed. In re Kean et al., 8 N. B. R. 367; 2 Hughes, 322; 2 Amer. Law Rec. 230; Fed. Cas. 7,630.

42. Where a fraudulent conveyance is made and set aside at the instance of an assignee, the head of the family is not estopped to set up the right to a homestead exemption. *Bartholomew, Ass., v. West et al.*, 8 N. B. R. 12; 2 Dill 290; 7 West. Jur. 441; Fed. Cas. 1,071.

43. Bankrupt and his partner bought two lots, the title bond being in the firm name, on which they built two houses, with the understanding that each should own, in severalty, the lot on which he built his house. The title bond was assigned to bankrupt's father, who procured the legal title and conveyed

the property to bankrupt's wife, all without consideration. Both transactions were set aside as fraudulent, and bankrupt did not assert his right to homestead until assignee applied for order to sell. *Held*, that he had a homestead interest in the lots; that it was not lost by fraudulent conveyance, nor by delay. *Id*.

44. Where a fraudulent conveyance is set aside by a bankrupt court, the homestead right of the bankrupt is not impaired, but remains as if the fraudulent deed had never been made. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

45. The making of a fraudulent conveyance does not forfeit the dower right of a wife, or the homestead exemption of the husband, as against the assignee in bankruptcy, when said conveyance has been set aside. *Cox v. Wilder et al.*, 7 N. B. R. 241; 2 Dill. 45; 5 Amer. Law J. Rep. (U. S. Cts.) 500; Fed. Cas. 3,308.

46. Real estate will only be set apart as a part of a bankrupt's exemption in cases where the sale of other real estate will not be injured, or the interests of the creditors adversely affected thereby. *In re Edwards*, 2 N. B. R. 109; Fed. Cas. 4,293.

47. A United States marshal, by virtue of a *fi. fa.* in favor of certain creditors of G., levied upon one house and lot and one store in the town of M. Subsequently G. filed his petition and was adjudged a bankrupt, claiming in his schedules to have exempted a dwelling-house and lot in M. After such adjudication the marshal sold the property under a levy, executing a deed therefor. *Held*, that the property was exempt from levy and sale, and the sale should be set aside. *In re Griffin*, 2 N. B. R. 85; 2 Amer. Law T. Rep. Bankr. 23; 1 Chi. Leg. News, 103; Fed. Cas. 5,813.

48. A borrower who mortgages the only real estate he owns to secure his loan is entitled, upon bankruptcy, to claim a homestead exemption out of the land so mortgaged. *In re Brown*, 8 N. B. R. 60; 2 Amer. Law T. 122; 1 Chi. Leg. News, 409; Fed. Cas. 1,980.

49. Bankrupt's estate consisted in part of a farm on which he resided, which was subject to a mortgage. Under laws of state he was entitled to homestead exemption to the value of \$500. The farm having been sold

free of such homestead right, *held*, that the bankrupt was entitled to a homestead of the full value of \$500 in the equity of redemption, and that such sum should be paid him out of the avails of the sale. *In re Beebe*, 19 N. B. R. 68; 26 Pittsb. Leg. J. 172; Fed. Cas. 1,226.

50. Under the statutes of Missouri in force prior to March 1, 1864, a homestead to the value of \$1,000, when owned by the head of the family, was exempt from execution. The exemption applied to an estate for years, when owned by the defendant in execution, and such an estate when sold by the assignee in bankruptcy is subject to the exemption, and the assignee will be ordered to pay over the sum of \$1,000 to the bankrupt, where the leasehold estate sells for more than that amount. *In re Beckerford*, 4 N. B. R. 59; 1 Dill. 45; 10 Amer. Law Reg. (N. S.) 57; 4 Amer. Law T. 14; 1 Amer. Law T. Rep. Bankr. 241; Fed. Cas. 1,209.

51. Under the constitution of Florida the debtor's shop, store or mill in which he pursues his usual trade, as well as the farmer's farm, if connected with and adjacent to his dwelling, is included in his homestead and therefore exempt; but a lumberman running a sawmill cannot claim those portions of the land adjacent to his dwelling which are not auxiliary to his homestead. *Greeley, Ass. v. Scott et al.*, 12 N. B. R. 248; 2 Woods, 657; Fed. Cas. 5,746.

52. Where the wife of a bankrupt owns a separate estate, not occupied as a homestead by the family, the bankrupt is entitled to his exemption. *In re Tonne*, 18 N. B. R. 170; 1 N. Y. Wkly. Dig. 473; Fed. Cas. 14,095.

#### (b) *When Not Allowed.*

53. Although a bankrupt has expressed an intention to make it a homestead, under the Kentucky statutes he is not entitled to an exemption of an undivided interest in land on which there are no improvements. *In re Duerson*, 18 N. B. R. 183; Fed. Cas. 4,117.

54. Under the laws of Wisconsin all the buildings on the quantity of land that might be exempted are not exempt. The dwelling house is exempt, but not the stores, shops and other buildings. *In re Lammer*, 14 N.

B. R. 460; 7 Biss. 269; 8 Chi. Leg. News, 386; 3 Cent. Law J. 574; Fed. Cas. 8,031.

55. A debtor owned a business block, having among other things two stores. One of these he occupied for business purposes, and into the other, shortly before he became bankrupt, he moved his family and resided there. He thereafter claimed the block as his homestead and as exempt. The assignee refused to so set it aside, and his report was approved by the court. *Id.*

56. A debtor knowing himself to be insolvent has no right, upon the eve of bankruptcy, to take his property and invest it in a homestead. *In re Boothroyd & Gibbs*, 14 N. B. R. 228; Fed. Cas. 1,632.

57. A bankrupt, to defraud his creditors, made a deed of his property, his wife joining. The deed was not recorded, but was stated to have been destroyed, and the bankrupt and his wife claimed respectively a homestead and a dower interest. *Held*, the deed being fraudulent as against creditors, neither right remained. *Cox, Ass., v. Wilder et al.*, 5 N. B. R. 443; Fed. Cas. 3,309.

58. If no right to a homestead exists under the state laws, such right is not given by the bankrupt act, nor the act of June, 1872. *In re Kerr & Roach*, 9 N. B. R. 566; Fed. Cas. 7,729.

59. A merchant who, two weeks before commencement of proceedings in bankruptcy against him, sells the house which he has previously occupied as his home for cash, and moves his family into his store, cannot claim the latter as a homestead exemption. *In re Wright*, 8 N. B. R. 430; 3 Biss. 359; Fed. Cas. 18,067.

60. A bankrupt is not entitled to the exemption of a homestead out of lands mortgaged by him at the time of purchase to secure the unpaid purchase-money. *In re Whitehead*, 2 N. B. R. 180; 1 Chi. Leg. News, 326; Fed. Cas. 17,562.

61. A bankrupt purchased a tract of land, receiving a deed therefor, and executing his notes, secured by a mortgage on the land, for the purchase-money, and on being adjudicated a bankrupt claimed to be entitled, under the exemption laws of the state, to hold sixty acres of the land exempt as a homestead. *Held*, that the land is not subject to exemption until the mortgage is discharged. *Id.*

62. An assignee has no power to set apart real estate to a bankrupt to cover a deficiency in the value of articles and necessities which the bankrupt is entitled to hold exempt. *In re Thornton*, 2 N. B. R. 68; 8 Amer. Law Reg. (N. S.) 42; Fed. Cas. 13,994.

63. One who has not complied with any of the provisions of a homestead exemption law is not entitled to claim in bankruptcy proceedings an exemption allowed thereunder. *In re Farish*, 2 N. B. R. 62; Fed. Cas. 4,647. See *Greeley, Ass., v. Scott et ux.*, 12 N. B. R. 248; 2 Woods, 657; Fed. Cas. 5,746.

### (c) *Head of Family.*

64. Where A., an unmarried man, sets up that he is head of a family, having a household under his supervision and minor children as apprentices awarded him by orphans' court, therefore claims exemption of homestead under state laws. Disallowed by the assignee; such decision affirmed by the court. *In re Summers*, 3 N. B. R. 21; Fed. Cas. 13,604.

65. An unmarried man who resides in a house of which he is proprietor, and has no other inmates than hired servants or persons living on his bounty, is the head of a family, and, as such, entitled to a homestead exemption; but he is not entitled to an additional allowance for inmates for whose maintenance he is legally bound. *In re Taylor*, 3 N. B. R. 38; Fed. Cas. 13,775.

66. An unmarried bankrupt's sister lived with the bankrupt, was in charge of his household and domestic affairs, paid no board, and considered the bankrupt's home her home. *Held*, that he was the head of a family, and as such entitled to a homestead exemption. *Bailey, Ass., v. Comings*, 16 N. B. R. 382; 4 Law & Eq. Rep. 684; 10 Chi. Leg. News, 49; 25 Pittsb. Leg. J. 51; Fed. Cas. 733.

67. A householder entitled to a homestead exemption does not forfeit his right by absence from home on account of ill-health. *Id.*

### (d) *Waiver.*

68. A bankrupt's waiver of his homestead rights in favor of a particular creditor does not confer upon his general creditors any special rights, nor operate in their favor, and, where the assignee does not claim under

the mortgage, is precisely the same as though the bankrupt had never made such waiver, and he is entitled to have his homestead set apart under the act. In re Poleman, 9 N. B. R. 376; 5 Biss. 526; 19 Int. Rev. Rec. 94; 6 Chi. Leg. News, 181; Fed. Cas. 11,247.

69. A debtor gave mortgages on his exempt property, in which he waived all homestead and exemption rights and his right to a discharge in bankruptcy. The property was left by the assignee in bankruptcy in the debtor's possession temporarily. Afterwards the mortgages were foreclosed and the property levied on. The assignee at no time actually had possession of the property, but it had been included in the schedules. *Held*, that the levy was a contempt of court, and the waiver could not be enforced until the property was allotted to the bankrupt. Byrd, Ass., v. Harrold et al., 18 N. B. R. 433; 26 Pittsb. Leg. J. 128; Fed. Cas. 2,269.

70. A bankrupt had no property beyond that exempted by the bankrupt law except a homestead, which was exempt by the state law. Only one creditor proved, and his claim was represented by promissory notes containing a waiver of the homestead exemption. The assignee applied for an order to sell the homestead. *Held*, that the title to the homestead did not pass to the assignee, and the creditor must pursue his remedy in the state courts. In re Bass, 15 N. B. R. 453; 3 Woods, 382; 9 Chi. Leg. News, 303; Fed. Cas. 1,091.

71. A bankrupt executed a note in which he waived his homestead exemption as "to this debt." *Held*, it was a valid waiver and the courts will enforce the same. In re Solomon, 10 N. B. R. 9; 2 Hughes, 164; 3 Amer. Law Rec. 226; 1 Amer. Law T. Rep. (N. S.) 351; Fed. Cas. 13,166.

72. A bankrupt who neglects to claim a homestead exemption in his schedule is deemed to have waived it. Steele v. Moody, 16 N. B. R. 553.

#### (e) *Miscellaneous.*

73. A husband has a right to invest the value of a homestead interest in premises to which others hold the legal title or in an undivided part interest in land. Johnson, Ass., v. May et al., 16 N. B. R. 425; Fed. Cas. 7,397.

74. If the exempted property of the bankrupt has been wrongfully seized on execution, the bankrupt has the same rights before the state tribunals as any other person whom it is sought to deprive of a homestead. In re Everitt, 9 N. B. R. 90; Fed. Cas. 4,579.

75. A bankrupt to whom an exemption of real estate to be used as a homestead has been allotted is vested, under the exemption laws of Ohio, with only a qualified interest therein so long as he uses it as a homestead for his family, with reversion in the assignee, which may be sold by the assignee, subject to the bankrupt's interest therein. In re Watson, 2 N. B. R. 174; 2 Amer. Law T. Rep. Bankr. 93; Fed. Cas. 17,371.

76. A person may be summarily ordered to release a mortgage taken upon property claimed as a homestead, after a decree declaring the premises not to be exempt. In re Boothroyd et al., 15 N. B. R. 368; Fed. Cas. 1,653; 2 Cent. Law Bul. 139.

77. In order that the debtor may claim the exemptions under the homestead laws of Georgia, the lands must be laid off and distinguished as his homestead exemption, and the fact that such lands have been set apart in a bankruptcy proceeding is not sufficient. Darsey v. Mumpford, 17 N. B. R. 181.

78. Bankrupt and his wife built a house on land bargained for by her and paid for in part from her separate means, and for which she afterwards paid the balance and took a deed. *Held*, that the assignee was entitled to a conveyance of the husband's interest in the premises less the amount he was authorized by law to invest in a homestead. Johnson, Ass., v. May et al., 16 N. B. R. 425; Fed. Cas. 7,397.

79. At the time judgment was recovered a homestead exemption of fifty acres of land was allowed the head of a family. State constitution adopted subsequent to time judgment was recovered but prior to its enforcement allowed a "homestead of realty to the value of \$2,000." In writ of *mandamus* to compel sheriff to make levy on the land claimed as exempted under the new constitution, *held*, that the provision including the homestead "impaired the obligation of the contract to enforce which the judgment was recovered, and therefore void." Gunn v. Barry, 8 N. B. R. 1; 15 Wall. 610.

80. A bankrupt applied for an order re-

quiring the assignee to set apart certain real estate as a homestead, and for an injunction restraining a creditor who had issued an execution on a judgment from selling the property. The application was denied, for if the property be a homestead its title is unaffected by the bankrupt act. If wrongfully seized in execution, it may be defended before state tribunals. In re Aunt, 5 N. B. R. 493; 4 Chi. Leg. News, 5; 2 Pac. Law Rep. 146; Fed. Cas. 6,883.

81. Where a homestead has been duly laid off and allotted under the state law, and no fraud, complication or other irregularity is shown, the bankrupt courts will not order a re-assessment for mere excess of value. In re Hall, 9 N. B. R. 366; 2 Hughes, 411; Fed. Cas. 5,921.

82. Petitioner obtained judgment prior to the ratification of the state constitution, which increased the amount to be allowed as a homestead exemption, upon contract made before the enactment of the bankrupt act. *Held* that, under the amending acts of 1872 and 1873, bankrupt was entitled to the increased exemption. In re Jordan, 8 N. B. R. 180; 5 Leg. Op. 169; 30 Leg. Int. 296; Fed. Cas. 7,514.

## V. PERSONALTY.

### (a) *When Allowed.*

83. Although they were taken under an execution prior to the beginning of proceedings in bankruptcy, a bankrupt's household furniture and other necessary articles are exempt and he is entitled to them. In re Martin, 13 N. B. R. 397; 2 Hughes, 418; Fed. Cas. 9,152.

84. The question whether the condition and circumstances of a bankrupt require the setting apart of necessities under section 14 of the bankrupt act of 1867 is one to be determined by the assignee, subject to the court's final determination on exception. In re Hay et al., 7 N. B. R. 344; 2 Lowell, 180; Fed. Cas. 6,253.

85. Under a state law allowing a bankrupt "working animals of the value of two hundred dollars," *held*, that he was entitled to a horse. In re Peabody, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

86. Register certified to district court the

question whether a plain and not extravagantly costly watch was properly allowed to a commercial man under section 5045, Revised Statutes, as a necessary article. *Held*, that such watch was exempt. In re Steele, 19 N. B. R. 41; 8 Cent. Law T. 86; Fed. Cas. 13,346.

87. Upon an action of replevin a judgment was obtained and an execution issued, upon which a levy was made upon all the personal property of the defendant. Later in the day the defendant filed his petition in bankruptcy and the sheriff was enjoined from selling the property, of which \$500 worth was claimed as exemption. The claim was allowed. In re Owens, 12 N. B. R. 518; 6 Biss. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; Fed. Cas. 10,632.

88. Under a writ of attachment the sheriff levied upon the personal property consisting of household furniture, and the same was sold *pendente lite*. Proceedings in bankruptcy were commenced within four months. The bankrupt claimed the proceeds of the sale as of property exempt. The claim was allowed. In re Ellis, 1 N. B. R. 154; Fed. Cas. 4,400.

### (b) *When Not Allowed.*

89. A merchant doing business and residing in Kansas is not entitled to the special exemption allowed mechanics, miners or other persons for the purpose of carrying on their trade or business. Such exemptions made by an assignee in bankruptcy will be disallowed. In re Schwartz, 4 N. B. R. 189; Fed. Cas. 12,508.

90. Money cannot be set apart to a bankrupt as part of his exemption unless it be the proceeds of articles which ought to be set aside under the head of "other articles and necessities of the bankrupt." In re Welch, 5 N. B. R. 348; 5 Ben. 230; Fed. Cas. 17,366.

91. Under the exemption laws of Arkansas, the bankrupt claimed personal property to the amount of \$2,000, and household and kitchen furniture, wearing apparel, etc., to the amount allowed under the bankrupt act. *Held*, that the bankrupt was entitled to exemptions aggregating \$2,000, and no more. In re Hezekiah, 11 N. B. R. 573; 2 Dill 551; 22 Pittsb. Leg. J. 164; Fed. Cas. 6,448.

92. Unless a bankrupt personally follows

some trade, occupation or profession which necessitates the ownership of a wagon and team, and unless he earns his living by such trade, occupation or profession, he is not entitled to such property as exempt under the bankrupt law. In re Parker et al., 18 N. B. R. 43; 5 Sawy. 58; Fed. Cas. 10,724.

93. A bankrupt merchant is not entitled to the protection of a provision in a state law exempting "tools and implements, or stock in trade." In re Peabody, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

94. An assignee cannot make an allowance from the general fund of money in lieu of articles seized and sold under distress for rent, which would otherwise have been exempt. In re Lawson, 2 N. B. R. 19; Fed. Cas. 8,149.

95. Bankrupt who was the head of a family, but not the owner of a homestead, claimed exemption of certain personal property. The wife was the owner of a homestead in her own right, which was occupied by herself and family. Up to May 1, 1871, this exemption was allowable in Ohio to the bankrupt, but subsequently it was not, as the law was changed. In re Baer, 14 N. B. R. 97; Fed. Cas. 728.

## VI. LIENS.

96. The allotment of an exemption by an assignee in bankruptcy does not impair the lien of a judgment. Haworth v. Travis et al., 18 N. B. R. 145.

97. The designation, by the assignee, of exempted articles does not divest them of any lien thereon, nor is he obliged to designate articles on which are no lien. In re Preston, 6 N. B. R. 545; Fed. Cas. 11,394.

98. Property of a bankrupt which he is entitled under a state law to hold exempt from levy and sale cannot be sold after he has filed his petition in bankruptcy to satisfy a prior levy thereon. In re Griffin, 2 N. B. R. 85; 2 Amer. Law T. Rep. Bankr. 23; 1 Chi. Leg. News, 103; Fed. Cas. 5,813.

99. A bankrupt is entitled to an exemption of household and kitchen furniture, and other articles and necessities, although the same were taken under an execution levied before the commencement of the proceedings in bankruptcy. In re Owens, 12 N. B. R. 518; 6 Biss. 432; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175; Fed. Cas. 10,632.

100. A mortgage creditor who does not prove his debt may enforce his mortgage in a state court, although the property be duly set apart to the bankrupt as exempt. Cumming v. Clegg, 14 N. B. R. 49.

101. A. had a lien on all the lands of B. B. later was discharged in bankruptcy, and a certain seventy acres of his land was set apart to him under the homestead law in bankruptcy proceedings. A. did not prove his claim in the bankruptcy proceedings. Held, the claim lien was not released. Darsey v. Mumpford, 17 N. B. R. 181.

102. Where the state law provides that a judgment is a lien from its date upon all the property of defendant, a judgment creditor has the right to enforce his lien against exempt property of a bankrupt, if creditor did not prove his claim in the bankrupt court. Bush v. Lester et al., 15 N. B. R. 36.

103. In granting an exemption under the bankrupt law, the order must recite that the exemption is to be held subject to the wife's right of alimony, decreed and to be decreed by the state court. In re Garrett, 11 N. B. R. 493; 2 Hughes, 235; Fed. Cas. 5,252.

104. A motion of the defendants to have satisfaction of a judgment entered of record was overruled, because after the rendition of the judgment they had each received a discharge in bankruptcy, it appearing that the debt was not proved in bankruptcy, and that the attachment was upon exempt property, and made less than four months prior to the bankruptcy proceedings. Robinson et al. v. Wilson, 14 N. B. R. 565.

105. The judgment of a court of ordinary setting apart property as a homestead exemption creates a lien on the property so allotted, and the judgment so rendered remains intact, though the fruits thereof may not be reaped by the parties to be benefited until an appellate court shall have determined its validity. In re Moseley, Wells & Co., 8 N. B. R. 208; Fed. Cas. 9,868.

106. Where, prior to filing a petition in bankruptcy, the debtor has disposed of a homestead exempted to him under the state laws, and which, if in his possession, would be protected under the act of March 3, 1873, against liens of prior judgments, he cannot invoke the protection of the bankrupt act in favor of his vendee. In re Everitt, 9 N. B. R. 90; Fed. Cas. 4,579.

## VII. PARTNERSHIP PROPERTY.

107. When, upon the bankruptcy of a partnership, there are no individual assets, the partners are each entitled to an exemption out of the social assets. In re Young, 8 N. B. R. 111; Fed. Cas. 18,148.

108. Joint assets are liable to the provisions of the bankrupt act allowing exceptions. Where there are not sufficient individual assets, assignees cannot refuse to set aside exempt property out of joint property. In re Rupp, 4 N. B. R. 25; Fed. Cas. 12,141.

109. If the individual estate of a bankrupt, one of a firm, is sufficient to furnish exemptions under a state law, it should alone be subject thereto; if not, the debtor has a right to have those exemptions allowed out of the copartnership estate. In re Richardson & Co., 11 N. B. R. 114; 7 Chi. Leg. News, 62; Fed. Cas. 11,776.

110. The assignee set apart as exempt the separate property of the bankrupt, but refused to allow them any part of the partnership assets. Exceptions were filed from the refusal and the exceptions were overruled. In re Hafer et al., 1 N. B. R. 147; 25 Leg. Int. 148; 15 Pittsb. Leg. J. 389; Fed. Cas. 5,896.

111. A firm being bankrupt one of the partners claimed the exemption allowed by the state law. Claim refused. In re Price, 6 N. B. R. 400; 1 Md. Law Rec. 236; Fed. Cas. 11,410.

112. An adjudication in bankruptcy of partnership dissolves the firm, and hence, there being no firm in existence to receive exemptions allowed, none can be set apart to the bankrupts as a firm. In re Blodgett & Sanford, 10 N. B. R. 145; Fed. Cas. 1,555.

113. Under sections 14 and 36 of the act of 1867 and the constitution of the state of Arkansas of 1868, bankrupts who are copartners are not entitled to separate or individual exemptions out of the partnership effects. In re Handlin & Venny, 12 N. B. R. 49; 3 Dill. 290; 2 Cent. Law J. 264; Fed. Cas. 6,018.

114. A partner in a firm in involuntary bankruptcy is not entitled to have his exemption set off to him out of the joint property of the firm. In re Tonne, 13 N. B. R. 170; 1 N. Y. Wkly. Dig. 437; Fed. Cas. 14,095.

115. The individual members of a firm are not entitled to exemption from the part-

nership stock. In re Boothroyd & Gibbs, 14 N. B. R. 223; Fed. Cas. 1,652.

116. A and B, doing a general merchandise business, filed a joint petition in bankruptcy, were adjudged bankrupts, and their entire stock and effects assigned to the assignee. Held, that they were not entitled each to the amount allowed as exempt property by a state statute. In re Hughes et al., 16 N. B. R. 464; 8 Biss. 107; Fed. Cas. 6,842.

117. Petition of one of a bankrupt firm for a house and lot as exempt, the lot being petitioner's sole property but improved with the firm's funds, the house, not the petitioner, being charged, the firm being indebted to petitioner more than cost of house and considered solvent. Held, that the house was part of the realty and petitioner's separate property; that the firm had no ownership in the house, and, by reason of indebtedness, no claim for reimbursement; and that only the excess over the amount allowed by exemption passed to the assignee. In re Parks et al., 9 N. B. R. 270; Fed. Cas. 10,765.

118. Assignee set apart as exempt out of the individual property of a member of a bankrupt firm \$493.30, and also property to the amount of \$1,500 out of the partnership property. The exemption allowed by the law of the domicile was \$1,500. Held, that the amount taken from the property of the firm should be reduced by the amount of the individual property. In re McKercher et al., 8 N. B. R. 409.

119. In the absence of fraudulent intent, partners may dissolve the partnership, sever their interest in the property, or one partner sell his interest to the other, and the continuing partner may have his exemption the same as though no partnership had existed. In re Bjornstad, 18 N. B. R. 232; 9 Biss. 13; Fed. Cas. 1,453.

120. A partner may with firm funds charged to himself while the firm is insolvent purchase property that will be exempt under a state law, but not where he does so on the eve of bankruptcy with intent to place property beyond the reach of creditors. In re Melvin et al., 17 N. B. R. 543; Fed. Cas. 9,406.

121. Persons who enter into partnership in order to save exemptions, when they are not allowed to the partnership, should see that they retain sufficient in their own indi-



vidual right to come within the protection of the exemption laws. In re Blodgett & Sanford, 10 N. B. R. 145; Fed. Cas. 1,555.

122. A firm had made a general assignment for the benefit of creditors. A member of the firm withdrew from the assignee certain articles claimed as exemptions. A homestead in his wife's name had been paid for partly by the wife and partly by money from the firm's earnings. In voluntary proceedings the firm was refused a discharge in bankruptcy. In re Croft Brothers, 17 N. B. R. 324; 6 N. Y. Wkly. Dig. 218; 8 Biss. 188; 10 Chi. Leg. News, 204; 6 Amer. Law Rep. 597; Fed. Cas. 3,404.

### EXPENSES.

See COSTS AND FEES; TRUSTEES, 15, 16.

### FACTOR.

See AGENT; FIDUCIARY DEBT, I.

### FALSE REPRESENTATIONS.

See CRIMES AND OFFENSES.

### FEDERAL QUESTION.

See APPEALS AND WRITS OF ERROR, 4.

### FEES.

See COSTS AND FEES; MARSHAL, IV; REF-  
EREE, III.

### FEME COVERT.

See MARRIED WOMAN.

### FIDUCIARY DEBT.

- I. COMMISSION MERCHANT OR FACTOR.
- II. ATTORNEY.
- III. BANKER.
- IV. BANKRUPT.
- V. IN GENERAL.

See AGENT, 24; CLAIMS, 12; COMPOSITION,  
154; DISCHARGE, X, (b), XIV, (b), XV, (c);  
PROOF OF CLAIMS, 46; SCHEDULE, 9.

### I. COMMISSION MERCHANT OR FACTOR.

1. A commission merchant acts in a fiduciary character, and therefore a debt comprising the proceeds of sale of commission goods will not be released under section 33 (act of 1867). Lenke v. Booth, 5 N. B. R. 351.

2. If goods be consigned to a bankrupt to sell on commission, and he fail to account for the proceeds, this is a fiduciary debt and will not be released by a discharge. Meador et al. v. Sharpe, 14 N. B. R. 492.

3. The default of a factor in not making payment to his principal is not a fraud, nor is such debt created while acting in any fiduciary character. Keime v. Graff et al., 17 N. B. R. 319; 5 Reporter, 489; 25 Pittsb. Leg. J. 118; Fed. Cas. 7,650.

4. Defendant had been plaintiff's agent in selling sewing machines, received a commission, and accounted and paid over the balance of sales monthly. Prior to commencement of suit defendant had been adjudicated a bankrupt, and plaintiff had him arrested under a state statute for the balance unpaid. Held, that the debt was not contracted in a "fiduciary character," and defendant discharged from arrest. Grover & Baker v. Clinton, 8 N. B. R. 312; 6 Chi. Leg. News, 33; 18 Int. Rev. Rec. 166; 21 Pittsb. Leg. J. 84; Fed. Cas. 5,845.

### II. ATTORNEY.

5. A debt growing out of the conversion by an attorney of his client's money or property, in his hands as such, both on principal and authority, is a debt created while acting in a fiduciary character. Flanagan v. Pearson, 14 N. B. R. 37.

### III. BANKER.

6. The obligation incurred by a banker, in the ordinary course of business as such, with his customers, is not fiduciary in its nature, but the liability only of an ordinary debtor, and his assignee will not be required to pay, out of funds belonging to the bank, the amount of a note and interest, on the ground that it had been placed in the bank simply for collection, the customer's account having been overdrawn at the time of crediting the proceeds on the books of the bank.

In re Bank of Madison, 9 N. B. R. 184; 5 Biss. 515; Fed. Cas. 890.

7. Money deposited with a banker to pay a note and mortgage of the depositor when they should be sent to him is not held by the banker in a fiduciary capacity. In re Hosie, 7 N. B. R. 601; 5 Leg. Op. 89; Fed. Cas. 6,711.

#### IV. BANKRUPT.

8. Bankrupts, before the appointment of the assignee, stand in a fiduciary relation to the estate and cannot be purchasers. March v. Heaton et al., 2 N. B. R. 66; 1 Lowell, 278; Fed. Cas. 9,061.

9. A payment by debtors, being insolvent and contemplating bankruptcy, is a fraudulent preference and an act of bankruptcy, notwithstanding such payment is made on a fiduciary debt. In re Dibble, 2 N. B. R. 185; 3 Ben. 283; 1 Chi. Leg. News, 355; Fed. Cas. 3,884.

#### V. IN GENERAL.

10. Plaintiffs and defendants formed a limited partnership, and in connection therewith defendants became indebted to plaintiffs. Held, that such debt was not a fiduciary debt. Pierce v. Shippe, 19 N. B. R. 221.

11. A judgment on a promissory note is not, *prima facie*, a fiduciary debt. Hayes v. Ford, 15 N. B. R. 569.

12. On a motion to dissolve an injunction by which a judgment creditor of the bankrupt was restrained from arresting the bankrupt on execution, the question arose, a composition having been offered, whether fiduciary debts would be released by the confirmation of a composition. Held, that such debts are discharged by a composition. In re Rodger et al., 18 N. B. R. 252; Fed. Cas. 11,991.

13. A debt will not be discharged by the discharge in bankruptcy of one who, acting in a fiduciary character, retains money belonging to his principal. Treadwell et al. v. Holloway et al., 12 N. B. R. 61.

14. If a fiduciary creditor of a bankrupt proves his debt and receives his proportionate share of the dividend, he is estopped from saying his debt was not within the law. Chapman v. Forsyth, 2 How. 202.

#### FINDINGS.

See CERTIFICATION.

#### FINE.

See DISCHARGE, 309.

#### FIRST MEETING.

See MEETINGS, I.

#### FIXTURES.

See RENT, 15; SALE, 50, 54.

1. A chattel mortgage of machinery and other things which would be trade fixtures as between landlord and tenant will give the mortgagee a valid lien as against the assignee in bankruptcy, although as against a prior mortgagee of the realty the fixtures would be real estate, if it appears that said prior mortgagee makes no claim to the fixtures. In re McKay and Aldus, 7 N. B. R. 230; 1 Lowell, 561; Fed. Cas. 323.

2. In a sale by the marshal, under an order of court, of the lease, good-will and fixtures of a grocery store, only such things (or their accessories) as are actually or constructively fastened to the freehold will pass to the purchaser of fixtures; and such a purchaser at such a sale may make claim upon the funds in the hands of the assignee for the sale of such articles as were properly included under the sale of the fixtures and afterwards resold as movables. In re Hitchings, 4 N. B. R. 125; Fed. Cas. 6,542.

3. A chattel mortgage "of all the goods and merchandise" in a store will not include fixtures. In re Eldridge, 4 N. B. R. 162; 3 Chi. Leg. News, 177; 2 Biss. 362; Fed. Cas. 4,330.

#### FORECLOSURE.

See MORTGAGE, VII.

#### FOREIGN.

See BANKRUPTCY LAW, 11; DISCHARGE, 233; STATE LAW, 23.

#### FRAUD.

I. ADJUDICATION.

II. ASSIGNMENTS.

III. MORTGAGES.

## IV. PREFERENCES.

(a) *In General*.(b) *In Judgments*.

## V. COMPOSITION.

## VI. TRANSACTIONS WITH RELATIVES.

## VII. PARTNERS.

## VIII. SALES.

## IX. CONCEALMENT.

## X. WHAT CONSTITUTES.

## XI. EVIDENCE.

(a) *In General*.(b) *Burden of Proof*.

## XII. STATUTE OF FRAUDS.

## XIII. JURISDICTION OVER.

## XIV. IN GENERAL.

See AGENT, 11; CLAIMS, 263; COLLATERAL ATTACK, 4, 5; COLLUSION; COSTS, 27; CONVEYANCES, 1; COURTS, 30; DISCHARGE, 21, 93, 154, 211, 231, X, (c), (d), XI, (b), XIV, (d); ESTATES, 12, 155, 292; EXAMINATION OF BANKRUPT, 19; EXEMPTIONS, 42-45; JUDGMENT, III, V, VI; LIENS, 37, 61; LIMITATIONS, STATUTE OF, 9, 10, 13, 81; PAYMENTS, 1-6, 10; PETITIONS, 79; PLEADING AND PRACTICE, 64, 97; PLEDGE, 4; RECEIVER, 13; SCHEDULE, 9; STATUTORY CONSTRUCTION, 64; STAY OF PROCEEDINGS, 5; TRUSTEE, 196.

## I. ADJUDICATION.

1. An adjudication cannot be set aside on the ground that the proper proportion of creditors did not unite in the petition, unless there be fraud, bad faith or collusion in obtaining it. In re Funkenstein, 14 N. B. R. 213; 3 Sawy. 605; 8 Chi. Leg. News, 345; 3 Cent. Law J. 448; 3 N. Y. Wkly Dig. 92; Fed. Cas. 5,158.

2. A creditor cannot impeach an adjudication in a collateral action on the ground that it was procured by fraud. Michaels et al. v. Post, Ass., 12 N. B. R. 152; 21 Wall. 398.

3. Upon the return day of the order to show cause, certain creditors who were not petitioners moved for leave to intervene and contest the adjudication upon the ground that the voluntary assignment was void, being executed by only three of the five partners personally, and in the name of the firm by one of the partners signing as attorney in fact for the firm, and alleging that such partner held no power of attorney for that

purpose. *Held*, that the motion must be denied; and that the moving creditors do not make a case of fraud or collusion to procure an adjudication to which the petitioning creditors are not in fact entitled. In re Lawrence et al., 18 N. B. R. 516; 10 Ben. 4; 26 Pittsb. Leg. J. 143; Fed. Cas. 8,133.

4. A creditor who seeks to set aside an adjudication proved his debt in June, 1878. Petition alleged that petitioner did not discover alleged fraud and collusion before September 28. Petition was filed December 9, 1878. *Held*, that there was no presumption, from his being party to proceedings, that he knew of fraud before that time, and delay in filing petition was not necessarily laches. In re Lalor, 19 N. B. R. 253; Fed. Cas. 8,001.

5. C., who joined in a voluntary petition with his partners and actually assisted in the proceedings, moved five months after adjudication to set it aside on the ground of the fraud of his partners in inducing him to join. *Held*, that though there is a possibility that he might establish the fraud, yet he has been guilty of such laches as to deny him the right. In re Court et al., 17 N. B. R. 555; Fed. Cas. 3,284.

## II. ASSIGNMENTS.

See ASSIGNMENTS, 39.

6. A debtor made an assignment of his property to an assignee for the benefit of his creditor and four days later filed a petition in bankruptcy. *Held*, that the burden of proof is upon him to show the absence of fraudulent intent. In re Brodhead, 2 N. B. R. 93; 3 Ben. 106; 1 Chi. Leg. News, 107; Fed. Cas. 1,918.

7. An assignment for the benefit of creditors, pending proceedings to have a debtor declared a bankrupt, is a fraud upon the bankrupt law, and such assignee will be enjoined from making any transfer of the assignor's property. In re Skoll, 16 N. B. R. 175; 9 Chi. Leg. News, 377; 6 Amer. Law Rec. 15; 1 Tex. Law J. 42; 4 Law & Eq. Rep. 196; 24 Pittsb. Leg. J. 207; Fed. Cas. 12,926.

8. Creditors cannot be heard to allege that an assignment is fraudulent because of facts of which they were fully informed, where they have concurred in execution of assignment. Johnson, Ass., v. Rogers et al., 15 N.

B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,403.

9. A power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent and therefore void. *Jones, Ass., v. Clifton*, 18 N. B. R. 125; 17 Amer. Law Reg. (N. S.) 713; 6 Reporter, 324; 7 Cent. Law J. 89; Fed. Cas. 7,457.

10. Any assignment or transfer of property by a failing debtor, not in the usual or ordinary course of business, is not only void, but is evidence of fraud. In *re Langley*, 1 N. B. R. 155.

11. A general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law (1867). *Platt v. Preston et al.*, 19 N. B. R. 241; Fed. Cas. 11,219.

### III. MORTGAGES.

See MORTGAGES, 2, 104.

12. A chattel mortgage of a stock of goods, executed by one copartner, and assented to by the other partners, containing a stipulation that the mortgagors are to remain in possession of the goods as agents of the mortgagee and account to him monthly for all sales of the mortgaged property until the indebtedness is paid, is valid and does not indicate fraud *per se*. *Hawkins, Ass., v. Bank*, 2 N. B. R. 108; 1 Dill. 462; Fed. Cas. 6,244.

13. Where creditors, having reasonable cause to believe their debtors insolvent, take a chattel mortgage to secure debts past due, it is a fraudulent preference. *Driggs, Ass., v. Moore, Foote & Co.*, 3 N. B. R. 149; 1 Abb. (U. S.) 440; Fed. Cas. 4,083.

14. If one insolvent in fact gives a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the bankrupt act is complete as to both. *Hall, Ass., v. Wager et al.*, 5 N. B. R. 181; 3 Biss. 28; 5 West. Jur. 538; Fed. Cas. 5,951.

15. A state court has jurisdiction to set aside a mortgage executed by a bankrupt in fraud of the bankrupt act. *Isett v. Stuart*, 16 N. B. R. 191.

16. A chattel mortgage of a stock of goods, which permits the mortgagor to dispose of the goods in due course of trade, is fraudulent

as to other creditors, and is void as to them, without reference to the good faith of the mortgage debt, or the intentions of the mortgagor as to fraud. In *re Foster*, 18 N. B. R. 64; 10 Chi. Leg. News, 315; Fed. Cas. 4,964.

17. The taking of a mortgage which expressly covers after-acquired goods, and keeping it from the records for the purpose of enabling the mortgagor to obtain more credit thereby, is a fraud on the creditors so deceived and is void as against them. In *re Stephens*, 6 N. B. R. 533; 3 Biss. 187; Fed. Cas. 18,865.

### IV. PREFERENCES.

See PREFERENCES.

#### (a) *In General.*

18. A mere fraud on the bankrupt act by accepting a preference in violation of its provisions is not an actual fraud. In *re Riorden*, 14 N. B. R. 332; Fed. Cas. 11,852; In *re The Bousfield & Poole Mfg. Co.*, 16 N. B. R. 489; Fed. Cas. 1,703.

19. Creditors are entitled to a trial by jury of the allegation that the bankrupt, being insolvent and in contemplation of becoming bankrupt, had made a fraudulent preference under the thirty-fifth section of the bankrupt act (1867). In *re Lawson*, 2 N. B. R. 125; Fed. Cas. 8,151.

20. To make a payment by debtor to creditor a fraudulent preference two things must concur: the debtor must be insolvent—that is, unable to pay his debts when due—and he must intend to prefer the creditor. *Morgan, Root & Co. v. Mastick*, 2 N. B. R. 163; Fed. Cas. 9,803.

21. Although the term "indorser" is not used in the thirty-fifth section of the bankrupt act (1867), any payment or preference to any indorser or surety is fraudulent and void when other circumstances give it that character. *Ahl, Jr., et al., Ass., v. Thorner*, 3 N. B. R. 29; 2 Bond, 287; 16 Pittsb. Leg. J. 78; 1 Chi. Leg. News, 337; Fed. Cas. 103.

22. Where a suit is necessary to recover property alleged to have been transferred in fraud of the bankruptcy act, judgment fixes the fact of fraudulent preference, and payment under execution on such judgment is not a surrender contemplated by the act.

In re Richter's Est., 4 N. B. R. 67; 1 Dill 544; 3 Chi. Leg. News, 38; Fed. Cas. 11,803.

23. An assignee in bankruptcy is empowered, by section 35 of the bankrupt act of 1867, to recover property transferred in fraud of the creditors, to set aside conveyances fraudulent at common law as well as those in fraud of the bankrupt act. *Bean v. Amsink*, 8 N. B. R. 228; 10 Blatchf. 361; Fed. Cas. 1,167.

24. Where an insolvent debtor, in a state where a creditor might legally be preferred, in June, 1868, transferred property to his creditor of much greater value than the debt, such transfer is void as to the excess over the debt as in fraud of creditors by common law. *Mitchell v. McKibbin*, 8 N. B. R. 548; 29 Leg. Int. 412; 21 Pittsb. Leg. J. 77; Fed. Cas. 9,666.

25. A sale by a bankrupt out of the usual course of business is *prima facie* fraudulent. *Babbitt v. Walbrun & Co.*, 4 N. B. R. 30; 1 Dill 19; 2 Chi. Leg. News, 285; Fed. Cas. 694; In re Deane et al., 2 N. B. R. 29; 15 Pittsb. Leg. J. 581, 583; Fed. Cas. 8,700.

#### (b) *In Judgments.*

26. Warrants were held by near relations of bankrupt, and he had stated to creditors that they could make nothing by pushing, as his relations had judgments, and he should protect them first, and also that his relations entered their judgments and issued executions thereon immediately on learning bankrupt's condition. *Held*, that executions were procured by bankrupt. *Shimer, Ass., v. Huber et al.*, 19 N. B. R. 414; 14 Phila. 402; 36 Leg. Int. 339; 8 Rep. 393; Fed. Cas. 12,787.

27. Where a debtor gave creditors, for money lent in good faith when neither debtor nor creditor had reasonable cause to believe debtor insolvent, warrants of attorney to confess judgments, and judgments were not entered therein until within four months of the filing of the petition in bankruptcy, when both debtor and creditor had reasonable cause to believe debtor insolvent, such judgments are fraudulent preferences. (In re Wright, 2 N. B. R. 155; Fed. Cas. 18,071, considered and overruled.) In re Lord, 5 N. B. R. 318; Fed. Cas. 8,503.

28. The petition was based upon a judg-

ment which was clearly a fraudulent preference. *Held*, such petition could not be sustained, but if the creditors surrendered their preference, the act of bankruptcy being confessed, an adjudication will be ordered. In re Hunt et al., 5 N. B. R. 433; Fed. Cas. 6,882.

29. Whether a judgment is rendered for fraud is not a question for a jury, but must be determined from an inspection of the record. *Flanagan v. Pearson*, 14 N. B. R. 37.

30. Judgments were obtained by creditors against an insolvent debtor for the want of affidavits of defense. *Held*, that such non-resistance was not necessarily a fraud on the bankrupt act. *Louchheim Bros. v. Hanzey*, 18 N. B. R. 173.

#### V. COMPOSITION.

See COMPOSITION, 31-34, 58, 60, 141.

31. If the debtor proposes an advance in the percentage of composition, such offer is demonstrative of the fact that the original offer is not for the best interest of the creditors. In re Scott. *Collins & Co.*, 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

32. A partner will not be allowed to have a composition set aside and his firm put into bankruptcy by setting up his own fraud in effecting the composition. In re Hamlin et al., 16 N. B. R. 522; 8 Biss. 122; 10 Chi. Leg. News, 131; Fed. Cas. 5,994.

33. If creditors who have received from bankrupt full payment of debt and then signed an agreement with other creditors to take seventy-five cents on the dollar in the future, it would be fraud which would give a right of action to the debtor or creditor thereby injured, or to the assignee in bankruptcy, who represents both the rights of the bankrupt and of creditors who have been defrauded. *Bean v. Brookmire & Rankin*, 7 N. B. R. 568; 2 Dill 103; 5 Chi. Leg. News, 814; 2 Amer. Law Rec. 222; 6 Amer. Law T. Rep. 418; 7 West. Jur. 324; Fed. Cas. 1,170.

34. Where a trader makes a compromise with his creditors by making a sale of his stock, giving to the creditors part cash and part notes of the purchaser, the same being done in pursuance of an arrangement made with some of the creditors directly, and oth-

ers through an agent, there is no fraud on the part of the debtor if an agent of one or more of the creditors exceeds his authority in accepting the compromise and the debtor is ignorant thereof. *In re Munger & Champ- lin*, 4 N. B. R. 90; Fed. Cas. 9,923.

35. When a debtor seeks to make a composition of his debts by the payment of a part, he is not bound to make any representations concerning his assets or resources; but he must act in good faith, and if he does make representations which are not true he is guilty of fraud, and the creditors are not bound by the composition deed fraudulently procured. *Elfeldt v. Snow*, 6 N. B. R. 57; 2 Sawy. 94; Fed. Cas. 4,342.

36. A composition includes and binds provable debts created by fraud. *In re Shafer et al.*, 17 N. B. R. 116; 1 N. J. Law J. 66; Fed. Cas. 12,695.

37. A debt created by fraud is discharged by a composition in which creditor participates. *Wells v. Lamprey*, 16 N. B. R. 205.

38. Where two years have elapsed since composition was effected and new liabilities have been created, the composition will not be set aside because it was procured by fraud. *In re Herman et al.*, 17 N. B. R. 440; 9 Ben. 436; Fed. Cas. 6,405.

## VI. TRANSACTIONS WITH RELATIVES.

39. A father having loaned his son \$5,000 to enable him to go into business, the son subsequently made a gift of a like sum to his mother by the purchase of a house in her name. The advance was made by the father to the son when the former was insolvent. *Held* a fraud upon the creditors of the father. *In re Eldred*, 3 N. B. R. 61; 1 Chi. Leg. News, 889; Fed. Cas. 4,328.

40. The transfer of real estate takes place at the time of the execution and delivery of the deeds, and not at their dates, which brings the transaction within the six months prescribed by the bankrupt act (1867). *In re Rooney*, 6 N. B. R. 163; Fed. Cas. 12,032.

41. Where a bankrupt sells to his brother-in-law his entire stock at twenty-five per cent. below cost, and the brother-in-law sells to a stranger at an advance of fifty per cent. on the purchase price, informing him at the same time of the circumstances of the pur-

chase, the sale will be set aside. *Walbrun v. Babbitt*, 9 N. B. R. 1; 16 Wall. 577.

42. Bankrupt made an ante-nuptial settlement with fraudulent design. *Held*, that such settlement should not be annulled without clearest proof of wife's participation in pretended fraud. *Prewit et al. v. Wilson, Ass.*, 19 N. B. R. 461; 103 U. S. 22.

43. The fact that the petitioning creditor and the debtor are brothers warrants the court in scrutinizing the claim closely, but not in inferring fraud from it alone. *In re Mendelsohn*, 13 N. B. R. 533; 3 Sawy. 343; Fed. Cas. 9,420.

## VII. PARTNERS.

44. Where A., holding several notes of B., exchanged one of them for notes of the same amount of a firm in which B. was a partner, *held*, that while this arrangement, if made in contemplation of bankruptcy, would be a fraud on the prior creditors, it could not be set aside when the bankruptcy occurred more than four months afterwards. *In re Boynton*, 10 N. B. R. 135.

45. A partner may, with firm funds charged to himself while the firm is insolvent, purchase property that will be exempt under a state law, but not where he does so on the eve of bankruptcy with intent to place property beyond the reach of creditors. *In re Melvin et al.*, 17 N. B. R. 543; Fed. Cas. 9,406.

46. For a fraud committed by a partner or an agent, the principal is not liable criminally, but he is liable in a civil suit if the fraud be committed in the transaction of the very business in which the agent was appointed to act. *Hoover, Ass. v. Wise et al.*, 14 N. B. R. 264; 91 U. S. 308.

47. Notes drawn by one partner in the firm name, apparently in the course of partnership business, without *mala fide* or actual knowledge by the holder of want of authority or intended misapplication, entitle the holder to their allowance against the bankrupt estate of the firm. *Van Camp Bush v. Crawford, Ass.*, 7 N. B. R. 290. Reversing *In re Dunkle and Dreisbach*, 7 N. B. R. 107; Fed. Cas. 4,161.

48. A partner retiring from the partnership may take from the social assets a por-

tion for his own use, provided that that which remains is clearly ample to satisfy the partnership obligations; but if the partnership is insolvent, or the assets not more than sufficient for the payment of the partnership debts, such appropriation is fraudulent, and no court will hesitate to hold it void as to creditors. In *re Sauthoff & Olson*, 16 N. B. R. 181; 8 Biss. 35; 5 Cent. Law J. 364; Fed. Cas. 12,380.

49. One member of a firm made statements, in ordinary conversation, to a party concerning the firm's business, on the strength of which the party bought from a third person a note of the firm. *Held* that, although the representation was false, the individual member was not liable. In *re Sohoo and Wells*, 15 N. B. R. 161; 8 Ben. 585; Fed. Cas. 12,483.

### VIII. SALES.

See SALES, 10, 24, 34, 37, 39, 41, 51, 57, 58.

50. Sales of property made in good faith, before insolvency, for a fair price, cannot be impeached for fraud. *Sedgwick v. Wormser*, 7 N. B. R. 186; Fed. Cas. 12,626.

51. A purchaser who, at the time he buys goods, intends not to pay for them, but by act or words, prior to or at the time of the sale, induces the vendor to believe that he does intend to pay, creates a debt by fraud. *Stewart v. Emerson*, 8 N. B. R. 462.

52. The retention of the possession of chattels by a vendor after the sale thereof is conclusive evidence of fraud as against creditors of the vendor, and the failure to include such property in his inventory at the time of filing his petition in bankruptcy, or otherwise disclose his interest therein, is concealment thereof and ground for withholding discharge. In *re Hussman*, 2 N. B. R. 140; 2 Amer. Law T. Rep. Bankr. 33; 1 Chi. Leg. News, 177; Fed. Cas. 6,951.

53. Where fraud in a sale by an assignee is alleged, every fact which is relied on to establish the fraud should be distinctly stated in a way which may be controverted, and the whole should be verified by some one having knowledge of the circumstances. In *re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

54. The bringing, or causing goods to be

brought, within reach of the execution by a debtor a short time before the sheriff's sale, this being followed closely by proceedings in bankruptcy, will not invalidate the sale. *Louchheim Bros. v. Henzey*, 18 N. B. R. 173.

### IX. CONCEALMENT.

55. A sale to bankrupt's wife of an interest in a firm by which her husband is employed as manager, receiving a share of the profits in lieu of a salary, and which is not engaged in an enterprise requiring an investment of capital, but in which the profits are derived from the diligence, skill and service of the members, the wife rendering no service but participating in the profits, her share of which, together with that of her husband, does not exceed a fair remuneration for the bankrupt's services, is a device to conceal the bankrupt's interest therein, and is a wilful concealment of the assets of his estate. In *re Rathbone*, 2 N. B. R. 89; 3 Ben. 50; 1 Amer. Law T. Rep. Bankr. 114; 1 Chi. Leg. News, 107; Fed. Cas. 11,581.

56. A bankrupt, upon being required to account by a statement of his receipts and expenditures for about \$4,500 which he is known to have received, states that the amount was realized by him from investments made in western land, at the request and for the benefit of his brother, and that having used the money for his own purposes, was paid by him in instalments, the only proof of the transaction being the testimony of himself and brother. *Held*, that the badges and indices of fraud in the transaction were not overborne by positive testimony and the bankrupt was guilty of concealing his estate. In *re Goodridge*, 2 N. B. R. 105; Fed. Cas. 5,547.

### X. WHAT CONSTITUTES FRAUD.

57. An act which directly and manifestly tends to defeat the purposes and policy of the bankrupt act, and which was done in contravention of and with intent to defeat such purposes and policy, is, for that reason, fraudulent and void. *Beattie v. Gardner et al.*, 4 N. B. R. 106; Fed. Cas. 1,195.

58. The buying of goods fraudulently, or when the debtor knew that he could not pay for them, is not a fraud which will prevent

the discharge of the bankrupt. In re Rogers, 8 N. B. R. 139; 1 Lowell, 123; Fed. Cas. 12,001.

59. When A. applied to B. for two five-hundred-dollar notes for one thousand dollars in small notes, and, B. claiming not to have them, A. took exchange on New York, B. knowing that his New York correspondent had protested his checks, and being at the time in the act of preparing a petition in bankruptcy, *held*, title vested in B. notwithstanding fraud, and A. could only share *pro rata*. In re King, 8 N. B. R. 285.

60. A bill was brought to prevent a creditor from proceeding with an execution levied upon the stock in trade of a bankrupt. The warrant of attorney upon which the execution was based was dated more than six months before, but the judgment was confessed within four months before, the filing of the petition in bankruptcy. *Held*, execution creditor's proceeding constituted constructive fraud. Hood et al. v. Karper et al., 5 N. B. R. 358; 8 Phila. 160; 28 Leg. Int. 340; Fed. Cas. 6,664.

61. The fraudulent intent is essential, and hence a sale by bankrupt to carry on his business and pay maturing obligations, even though made to one who knew of his insolvency, and at a price below cost, cannot be set aside. Sedgwick, Ass., v. Lynch, 8 N. B. R. 289; 5 Ben. 489; Fed. Cas. 12,615.

62. A purchaser who buys goods, intending at the time of the purchase not to pay for them, creates a debt by fraud within the meaning of the bankrupt act. In re Alsborg, 16 N. B. R. 116; Fed. Cas. 261.

63. Perfect equality among creditors is the fundamental principle upon which the bankrupt act proceeds; anything that defeats that is a fraud upon the law. In re Palmer, 14 N. B. R. 437; 2 Hughes, 177; Fed. Cas. 10,673.

64. The fraud referred to in Revised Statutes, section 5117, means positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. Neal v. Scruggs et al., 17 N. B. R. 102; 95 U. S. 704.

65. There is nothing dishonest or illegal in a creditor securing a debt due him from a failing debtor. Actual fraud does not em-

brace the act of a creditor who attempts by proper and ordinary effort to secure an honest debt, which act may afterward become a legal fraud by reason of the filing of a petition and adjudication in bankruptcy. In re The Bousfield & Poole Mfg. Co., 16 N. B. R. 489; Fed. Cas. 1,703.

66. Any act the effect of which is to evade the provisions of the bankrupt act is an act done in fraud of it. Webb, Ass., v. Sachs et al., 15 N. B. R. 163; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

## XI. EVIDENCE.

See EVIDENCE, 113.

### (a) *In General.*

67. A bankrupt was indicted for concealing assets from the assignee. *Held*, that in order to convict, it was not necessary to prove demand made by assignee for the assets in question. United States v. Smith, 13 N. B. R. 61; Fed. Cas. 16,339.

68. Evidence of fraud in the creation of a debt is inadmissible in proceedings in bankruptcy. In re Talman, 1 N. B. R. 122; 2 Ben. 348; Fed. Cas. 13,739.

69. Inadequacy of price, as an evidence of fraud, in a sale by an insolvent vendor, should be left to the jury. Rhoads v. Blatt, 16 N. B. R. 32.

70. In an action to set aside a conveyance by an insolvent debtor on the ground of fraud, *held*, that fraud must be proved, not assumed. Campbell, Ass., v. Waite et al., 16 N. B. R. 93; 9 Ben. 166; Fed. Cas. 2,374.

71. A charge of fraud in the concealment of a bankrupt's estate from which badges and indices of fraud are deducible must be overborne by positive testimony. In re Goodridge, 2 N. B. R. 105; Fed. Cas. 5,547.

72. It is sufficient to prove intent to prefer and that creditor had reasonable cause to believe the debtor insolvent to show that debtor, while insolvent, paid this creditor in full without making like provision as to other creditors, and that at the time of receiving such preference such creditor had reasonable cause to believe debtor insolvent and the debtor knew it. Stobaugh, Ass., v. Mills et al., 8 N. B. R. 361; 5 Chi. Leg. News, 536; Fed. Cas. 13,461.



73. When the question is whether a written instrument is a fraud in law, it must be determined from the instrument itself. *Miller, Ass. v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,576.

74. A creditor receiving payment with cause to believe his debtor insolvent is presumed to know that such debtor thereby intended a fraud upon the act. *Brooke, Ass. v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

75. When it is sought to affect a second vendee with fraud, such fraud must be shown, and the mere fact, without more, that he knew that the sale by the bankrupt to the first vendee embraced all the stock of the seller, will not make the purchase of the second vendee fraudulent in law. *Babbitt v. Walbrun & Co.*, 4 N. B. R. 30; 1 Dill 19; 2 Chi. Leg. News, 285; Fed. Cas. 694.

76. The president of a bank being advised that to press for payment would embarrass the debtor, and having other evidence of his insolvency, had reasonable cause to believe the debtor insolvent, and, since they both knew the effect of judgment, execution and levy would be to give the bank a preference, the conduct of the bank was a fraud on the act. *Warren v. Bank*, 7 N. B. R. 481; 10 Blatchf. 493; Fed. Cas. 17,202.

### (b) *Burden of Proof.*

77. In an action by the assignee to recover for goods sold by bankrupt shortly before commencement of proceedings, the burden is on the plaintiff to show a guilty collusion to defraud creditors. *Dickinson v. Adams*, 17 N. B. R. 380; 4 Sawy. 257; Fed. Cas. 3,896.

78. Where the defense is that certain securities belong to the alleged creditor on account of fraud, the burden of proof is on the debtor to establish the fraud and the identity of the securities by a fair preponderance of evidence. *Payne et al. v. Solomon*, 14 N. B. R. 162; Fed. Cas. 10,856.

79. The unexplained suspension of commercial paper for a longer period than fourteen days is *prima facie* evidence of fraud, within the meaning of the act (1867), at least sufficient to cast the burden of proof on the debtor. In *re Ballard et al.*, 2 N. B. R. 84; 1 Chi. Leg. News, 103; Fed. Cas. 816.

80. Where a transaction that contemplates the securing of a debt is out of the ordinary course of business, the bankrupt act of 1867 declares it to be *prima facie* fraudulent, and the *onus* of showing that it is not so is cast upon the defendant. *Martin v. Toof et al.*, 4 N. B. R. 158; 1 Dill 203; Fed. Cas. 9,167. Also 6 N. B. R. 49.

## XII. STATUTE OF FRAUDS.

81. It is not necessary that an agreement to extend time of payment of a debt which is secured by a mortgage or deed of trust on real estate should be in writing. In *re Betts*, 15 N. B. R. 536; 4 Dill 93; 24 Pittsb. Leg. J. 195; 4 Cent. Law J. 558; Fed. Cas. 1,871.

82. Certain goods sold were weighed in the presence of the vendee, and the vendee placed them in the vendor's warehouse and marked them with his name. They were to be delivered when sent for. *Held*, that such acts were an acceptance and would take the sale out of the statute of frauds of Massachusetts. *Ex parte Safford*, In *re Downing*, 15 N. B. R. 564; 2 Lowell, 503; 15 Alb. Law J. 328; 24 Pittsb. Leg. J. 159; Fed. Cas. 12,212.

83. There can be no sufficient receipt to take a sale out of the statute of frauds so long as the vendor holds as vendor and insists on his lien for the price. *Id.*

## XIII. JURISDICTION OVER.

84. A debt created by fraud should be litigated and the question of fraud in the creation of the debt finally determined by the court in which the proceedings of bankruptcy are pending. In *re Wright*, 2 N. B. R. 57; 36 How. Pr. 167; 2 Ben. 509; Fed. Cas. 18,065.

85. The bankrupt court has a right to determine the question as to fraud in the contracting of a debt, and it is not bound by a statement in a declaration or complaint made by a party in a state court. In *re Williams et al.*, 11 N. B. R. 145; 6 Biss. 233; 7 Chi. Leg. News, 49; Fed. Cas. 17,700.

86. A petition was signed by six creditors and verified by the first five, they alleging that they verily believed that they constituted one-fourth of the creditors. In fact, they knew that they did not constitute one-fourth. *Held*, that the court upon whom such fraud

was practiced had power, and it was its duty, to set aside any process obtained by the deception. In re Keiler et al., 18 N. B. R. 10; Fed. Cas. 7,647.

#### XIV. IN GENERAL.

87. A debt created by fraud may be proved under the bankrupt act, and, when the amount is disputed, a suit to determine its amount may be allowed to proceed in a state court. In re Rundle et al., 2 N. B. R. 49; 1 Chi. Leg. News, 30; Fed. Cas. 12,138; In re Wright et al., 2 N. B. R. 14; 15 Pittsb. Leg. J. 553; Fed. Cas. 18,070.

88. Prior to bankruptcy, bankrupts issued warehouse receipts. In action by assignee, *held*, that in the action of fraud he was estopped to deny validity of said receipts. Sharpe, Ass., v. The Phila. Warehouse Co., 19 N. B. R. 378.

89. Fraud does not render a contract void, but voidable only, at the option of the party defrauded, both at law and in equity. Foreman, Ass., v. Bigelow et al., 18 N. B. R. 457; 7 Reporter, 137; 26 Pittsb. Leg. J. 128; Fed. Cas. 4,934.

90. Though there be no actual fraud on the part of the agent, yet, if he makes a false representation as to a matter peculiarly within his own knowledge or that of his principal, such principal, though innocent, cannot take the benefit of the transaction. Elfelt v. Snow, 6 N. B. R. 57; 2 Sawy. 94; Fed. Cas. 4,342.

91. In an action by an assignee in bankruptcy of a fraudulent debtor, when the fraud was continuous and the debtor remained the real owner of the property sought to be recovered and in possession of it down to the time suit was brought, *held*, that the state statute of limitations did not bar the suit, even though the initial fraudulent transaction took place at a time greater than the period of limitations. Martin v. Smith, 4 N. B. R. 83; 1 Dill. 85; Fed. Cas. 9,164.

92. Where fraud is practiced by some of the co-petitioners in the name of all, unless the innocence of the others appears clearly, they cannot be held innocent of the fraud. Petitions in bankruptcy are considered to be the joint act of all joining in them. In re

Keiler, 18 N. B. R. 10; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 7,647.

93. The provision which prevents a creditor, in case of actual fraud, from proving more than a moiety of his debt, applies only where there has been a recovery. In re Riorden, 14 N. B. R. 332; Fed. Cas. 11,852.

94. If a debtor purchases gold certificates by means of an overdraft on a bank, under an agreement that the proceeds of all overdrafts of his shall be the property of the bank, or with the preconceived idea of never paying back the money obtained by the overdraft, but of defrauding the bank, a transfer of certificates to the bank is not an act of bankruptcy. Payne et al. v. Solomon, 14 N. B. R. 162; Fed. Cas. 10,856.

95. A claim continues to constitute a provable debt if it originated in contract, even though induced by fraud and prosecuted in an action for damages, although the fraud may have to be proved to entitle the plaintiff to recover. In re Schwarz, 15 N. B. R. 330; 14 Blatchf. 196; 15 Alb. Law J. 350; Fed. Cas. 12,502.

96. One who fraudulently contracts a debt is not relieved by a discharge in bankruptcy. Libbey v. Strassburger, 17 N. B. R. 468.

97. Bankrupts created debt by fraud. Creditor having proved his claim and taken a dividend instituted suit for balance in state court and procured warrant of arrest. On motion by bankrupts for stay of proceedings and to set aside warrant of arrest, *held* that, as debt was created by fraud, creditor did not waive his right to sue for balance by proving his claim and taking a dividend. In re Clews et al., 19 N. B. R. 109; Fed. Cas. 2,891.

98. On indictment against bankrupt for disposing of his goods with intent to defraud, *held*, that it was not necessary, in order to convict, that the goods should have been obtained within three months prior to bankruptcy proceedings; it was sufficient if they were disposed of within that time. United States v. Smith, 13 N. B. R. 61; Fed. Cas. 16,339.

99. Buying goods in large amounts without intent to pay for them, and disposing of same without record or other evidence as to in whose hands they were placed, is a criminal offense under section 44 of the act of 1867. United States v. Thomas, 7 N. B. R. 188.

100. Where the debt is based on fraud it does not merge in a judgment so as to permit it to be discharged in bankruptcy; but, when the original debt arises on contract, and fraud is an incident and not its creative power, it does merge in the judgment, and the bankrupt will be discharged therefrom when such judgment was prior to the filing of the petition. *Shuman v. Strauss*, 10 N. B. R. 800.

101. A mere fraud on the law by the acceptance of a preference is not of itself an actual fraud precluding the proving of the debt against the bankrupt. *Streeter v. Bank*, 147 U. S. 87.

102. Where a bankrupt fraudulently conveyed his property to avoid a judgment, a purchaser at the sale under execution on said judgment cannot defend on the ground that the assignee had not sued to set aside said conveyance, judgment and sale within two years. *Davis v. Anderson*, 6 N. B. R. 145; Fed. Cas. 8,023.

103. Property conveyed in fraud of creditors prior to the bankrupt act (1867) is to be regarded as vested in the assignee in bankruptcy under that act. *Goodwin v. Sharkey*, 3 N. B. R. 138.

104. An assignee in bankruptcy may sue in state as well as the United States courts to recover property disposed of in fraud of the bankrupt act. *Gilbert v. Priest*, 8 N. B. R. 159.

105. Where it is claimed that a contract of compromise is void for fraud, it is void wholly and not in part, and the creditor cannot retain the benefit and prove the balance of his claim against the estate. In re *Lathrop*, 3 N. B. R. 105; 3 Ben. 490; Fed. Cas. 8,108.

106. Where A. made a loan to B. and placed the amount of the loan in the hands of B.'s agent after B.'s failure, but before A. knew of it, and when A., immediately on learning of B.'s failure, sought to reclaim the amount of the loan still in the hands of B.'s agent, B.'s assignee in bankruptcy has no title to said money. *Purviance v. Bank*, 8 N. B. R. 447; Fed. Cas. 11,475.

107. The decree of the United States circuit court cannot restrain the plaintiffs from proceeding against the bankrupt *ex delicto* in the state court, on account of his fraudu-

lent appropriation of funds, and the proceedings in bankruptcy did not suspend such proceedings in a state court. *Horter et al. v. Harlem*, 7 N. B. R. 233.

## GARNISHMENT.

See ATTACHMENT.

## GENERAL ASSIGNMENT.

See ASSIGNMENT.

## GIFT.

1. A mere agreement to give does not constitute a complete and perfect gift of what may be realized from a claim. It is only a promissory arrangement. *Williamson et al., Ass., v. Colcord et al.*, 13 N. B. R. 319; 1 Hask. 620; Fed. Cas. 17,752.

2. A prior gift constitutes no legal consideration for a promissory note, and the claim of the holder to be a creditor may be defeated on that ground. In re *Cornwall*, 6 N. B. R. 305; 9 Blatchf. 114; 6 Amer. Law Rev. 365; Fed. Cas. 3,250.

3. A gift by a bankrupt to his wife, before adjudication and not in contemplation of insolvency, of funds which were used in improving the separate estate of the wife, does not vest him with such an interest therein as would pass to his assignee, and need not be set forth in his schedules. In re *Wyatt*, 2 N. B. R. 94; 1 Chi. Leg. News, 107; Fed. Cas. 18,106.

## GROWING CROPS.

See RENT, 43.

1. Growing and ungathered crops should be placed upon a bankrupt's schedule as personal property. In re *Schumpert*, 8 N. B. R. 415; Fed. Cas. 12,491.

2. Mortgagee of the real estate of a bankrupt, with condition broken before proceedings in bankruptcy, notified the marshal when he seized bark, wood and timber on the premises, and logs a short distance away, and grass and other crops unharvested, that the

mortgagee claimed the whole, which mortgagee's claim was sustained. *In re Bruce*, 16 N. B. R. 318; 9 Ben. 236; Fed. Cas. 2,045.

### GUARANTOR.

See SURETY.

### GUARDIAN AND WARD.

See DISCHARGE, 244, 300.

1. A guardian's liability to his ward is not affected by proceedings in bankruptcy, except that he shall be credited for any amount received by the ward in distribution. *In re Maybin*, 15 N. B. R. 468; Fed. Cas. 9,337.

2. If a guardian transcends his power by making an agreement to discharge one mortgage and take a new one, such agreement is only voidable, and that only at the election of the ward on coming of age, and it is valid against the assignee of the mortgagor until so avoided. *Burdick, Ass., v. Jackson et al.*, 15 N. B. R. 818.

3. The surety's liability attaches whenever the guardian receives property of his ward and becomes a debt on the guardian's default, with a right of action accruing in law against him on the rendition of a decree or judgment ascertaining the fact and the amount of default; it is a contingent liability within the meaning of the bankrupt law, capable of being fixed or having its present value ascertained. *Jones & Cullom v. Knox*, 8 N. B. R. 559.

4. A surety in a guardian's bond is not included among those not released by a discharge in bankruptcy, by section 5117, Revised Statutes. *Ex parte Taylor*, 16 N. B. R. 40; 24 Pittsb. Leg. J. 205; 1 Hughes, 617; Fed. Cas. 18,773.

5. A defalcation of a guardian constitutes a debt created while acting in a fiduciary capacity, and is not affected by a discharge in bankruptcy. *Halliburton v. Carter*, 10 N. B. R. 359.

### HABEAS CORPUS.

1. A bankrupt arrested and imprisoned before the proceedings in bankruptcy have commenced cannot be released by the court

upon a petition for a writ of *habeas corpus*. *In re Walker*, 1 N. B. R. 60; 1 Lowell, 222; Fed. Cas. 17,060.

2. Bankrupt sold goods on commission, and did not account for the proceeds. On *habeas corpus* it was held that the debt was created while bankrupt acted in a fiduciary capacity and was not dischargeable in bankruptcy. *In re Seymour*, 1 N. B. R. (8 vo. ed.) 29.

3. The United States district court has no power to discharge on *habeas corpus* from custody a bankrupt held under arrest upon process issued by a state court in an action of tort in the nature of deceit. *In re Devoe*, 2 N. B. R. 11; 1 Lowell, 251; 7 Amer. Law Reg. (U. S.) 690; 1 Amer. Law T. Rep. Bankr. 90; Fed. Cas. 3,843.

4. A bankrupt who has been arrested on process of a state court for a debt which is not dischargeable in bankruptcy will not be released on *habeas corpus*. *In re Valk*, 3 N. B. R. 73; 3 Ben. 431; Fed. Cas. 16,814; *In re Alsberg*, 16 N. B. R. 116; Fed. Cas. 261.

### HOLIDAY.

See TIME, 1.

The docketing of a prohibitory judgment on a holiday is not void, in the absence of state legislation, and establishes a lien on the real estate of the debtor in the county where filed. *In re Worthington*, 16 N. B. R. 52; 7 Biss. 455; 1 N. W. Rep. (O. S.) 109; 9 Chi. Leg. News, 346; 4 Law & Eq. Rep. 78; 16 Alb. Law J. 63; 23 Int. Rev. Rec. 238; 2 Cin. Law Bul. 189; Fed. Cas. 18,051; reversing a. c., 14 N. B. R. 388.

### HOMESTEADS.

See EXEMPTIONS, IV.

### HUSBAND AND WIFE.

See MARRIED WOMAN.

### IMPRISONMENT.

See ARREST; HABEAS CORPUS.

**INADVERTENCE.**

See DISCHARGE, 83.

**INCRIMINATION.**

See EXAMINATION, ETC., 14.

**INCUMBRANCE.**

See COURTS, 150; MORTGAGES, XII.

**INFANTS.**

See PETITIONS, III, (c).

Upon proof of claims made by the father of a minor son, for the labor of such son as an operative in the employment of the bankrupt within the six months next preceding the first publication of the notice of proceedings in bankruptcy, *held*, that the father is entitled to be preferred to an amount not exceeding \$50 (act of 1867). In re Harthorn, 4 N. B. R. 27; Fed. Cas. 6,162.

**IN FORMA PAUPERIS.**

See COSTS AND FEES, 50, 54.

**INITIALS.**

See CLAIMS, 244; COMMERCIAL PAPER, 21.

**INJUNCTION.****I. WILL BE GRANTED.**

- (a) *When.*
- (b) *To Restrain Creditors.*
- (c) *To Prevent Interference.*
- (d) *To Restrain Sale.*
- (e) *To Restrain State Court.*
- (f) *To Restrain Sheriff.*
- (g) *In General.*

**II. WILL NOT BE GRANTED.**

- (a) *Unless Bankrupt Proceedings Are Begun.*
- (b) *In General.*

**III. CONTEMPT.****IV. MODIFICATION.****V. NOTICE.****VI. PRACTICE.****VII. UNTIL ADJUDICATION.****VIII. IN GENERAL.**

See ARREST, 1; ASSIGNMENTS, 23; COMMERCIAL PAPER, 66; COMPOSITION, 77-83; COURTS, 31, 41, 66, 74, 138, 148, 153, 234, 260; DISCHARGE, 10, 200, 202, 314; ESTATES, 4, 109, 281; JUDGMENTS, 4, 22, I; MANDAMUS, 1; MORTGAGES, 76, 80; PETITIONS, 156, 157; PLEADING AND PRACTICE, 150, 240-250; PREFERENCES, 48; RES ADJUDICATA, 2; SALE, 53; TRUSTEES, 179.

**I. WILL BE GRANTED.****(a) When.**

1. Courts of bankruptcy will only interfere by summary order to avoid a conflict of jurisdiction between the officers of state courts and those of the court of bankruptcy when such conflict clearly appears to exist. In re Davidson, 2 N. B. R. 49; 2 Ben. 506; Fed. Cas. 3,598.

2. The debtor is not entitled to an injunction until he surrenders himself to the court. In re Tift, 18 N. B. R. 78; Fed. Cas. 14,031.

3. Bankrupt and others may be enjoined from disposing of any of the bankrupt's property until the further order of the court. In re Camp, 1 N. B. R. 18; Fed. Cas. 2,846.

4. An injunction lies to restrain proceedings in state court though begun prior to filing of petition. In re Citizens' Savings Bank, 9 N. B. R. 152; Fed. Cas. 2,735.

5. It seems that the United States district court has power under some circumstances to enjoin a citizen within its jurisdiction from holding a bankrupt under arrest in a foreign jurisdiction. In re Hazleton, 2 N. B. R. 12; 1 Lowell, 270; Fed. Cas. 6,287.

6. Where a corporation was dissolved by decree of a state court and a receiver appointed before adjudication, but after the service of an order to show cause, an injunction may be granted against such receiver. Platt, Ass., v. Arches, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,213.

**(b) To Restrain Creditors.**

7. An injunction should issue to prevent certain of bankrupt's creditors who had obtained judgment against him during the bankruptcy proceedings from selling his

property under execution after he had been adjudicated a bankrupt. In *re Wallace*, 2 N. B. R. 52; *Deady*, 433; 3 *Amer. Law Rev.* 174; 1 *Chi. Leg. News*, 80; *Fed. Cas.* 17,094.

8. Bankrupt, who petitioned and was adjudged bankrupt pending an appeal from judgment of state court on debt provable in bankruptcy, was granted injunction restraining judgment creditors. In *re Metcalf & Duncan*, 1 N. B. R. (8 vo. ed.) 201.

9. An injunction granted to restrain creditor, who sued debtor when he had reasonable cause to believe debtor insolvent, from enforcing judgment. *Haskell, Ass. etc., v. Ingalls*, 5 N. B. R. 205; 1 *Hask.* 341; *Fed. Cas.* 6,193.

10. A bankruptcy court has jurisdiction, after an adjudication of bankruptcy, and before the appointment of an assignee, to grant, upon the petition of creditors, an injunction restraining attaching creditors from further proceeding against the property which, in their suit against the bankrupt, they have attached; and may also punish for contempt the attaching creditors who disregard such order. In *re Ulrich et al.*, 8 N. B. R. 15; 6 *Ben.* 483; *Fed. Cas.* 14,328.

11. An injunction was granted to prevent the prosecution of a suit by certain creditors to enforce payment of an order on the managers of a fund belonging to the bankrupt. *Walker, Ass. v. Seigel & Bott et al.*, 12 N. B. R. 394; 2 *Cent. Law J.* 508; *Fed. Cas.* 17,085.

12. The bankrupt court cannot be asked to enjoin the creditors from receiving the composition, unless the plaintiff claims a specific lien upon the fund in an action against the creditors, or a receiver has been appointed who has succeeded to the creditors' title. In *re Kohlsaas et al.*, 18 N. B. R. 570; *Fed. Cas.* 7,918.

13. The district court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a state court against the property of the bankrupt. In *re Fuller*, 4 N. B. R. 29; 1 *Sawy.* 243; 18 *Pittsb. Leg.* 82; 2 *Chi. Leg. News*, 373; *Fed. Cas.* 5,148.

#### (c) *To Prevent Interference.*

14. A litigant in a state court may be restrained, by an injunction issued from a United States court for the judicial district

in which proceedings in involuntary bankruptcy are pending, from doing that which would frustrate or directly impede the jurisdiction conferred by the act (1867). *Irving v. Hughes*, 2 N. B. R. 20; 7 *Amer. Law Reg.* (N. S.) 209; 6 *Phila.* 451; 24 *Leg. Int.* 390; 15 *Pittsb. Leg. J.* 121; *Fed. Cas.* 7,076.

15. A vessel in the hands of the assignee as assets cannot be attached in an action *in rem* for damages caused by her collision with another vessel prior to the adjudication in bankruptcy, and the bankruptcy court will restrain such proceedings by injunction. In *re People's M. S. S. Co.*, 2 N. B. R. 170; 3 *Ben.* 226; *Fed. Cas.* 10,970.

16. The district court in an involuntary case in bankruptcy has no authority under a provisional warrant to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition, but may issue an injunction to prevent its disposal by such person. In *re Holland, Jr.*, 12 N. B. R. 403; 1 *N. Y. Wkly. Dig.* 126; *Fed. Cas.* 6,605.

#### (d) *To Restrain Sale.*

17. A bankruptcy court has power to issue an injunction to prevent the sale of a debtor's land under a judgment by the state court. In *re Lady Bryan Mining Co.*, 6 N. B. R. 252; *Fed. Cas.* 7,980.

18. The court in bankruptcy can restrain the sale of a debtor's land under a judgment of the state court, as the lien existing thereby must be enforced through the bankrupt court. *Id.*

19. Where, after sale by a mortgagee of the mortgaged premises prior to petition, the purchaser refuses to make payment as required by the terms of the sale and to receive the deed, the bankrupt court will enjoin the mortgagee from proceeding to a second sale of the premises after commencement of proceedings in bankruptcy against the mortgagor. *Whitman v. Butler*, 8 N. B. R. 487; *Fed. Cas.* 17,579.

20. The bankruptcy court has power to allow goods levied on to be sold under the execution, or to enjoin the proceedings thereunder, and to order the assignee to take possession and sell the goods, with leave to the judgment creditors to apply for an order to have their liens satisfied out of the proceeds. In *re Schnepf*, 1 N. B. R. (8 vo. ed.), 190.

(e) *To Restrain State Court.*

21. Certain creditors brought an action in a state supreme court alleging that while a debtor was insolvent he purchased with his own money certain realty, and praying that the debtor be declared to hold the property in trust. Before the suit was commenced a voluntary petition in bankruptcy was filed, whereupon the said creditors proved their debts. The bankruptcy court made an order staying proceedings in the state court. *In re Meyers*, 1 N. B. R. 163; 2 Ben. 424; Fed. Cas. 9,513.

22. A bankruptcy court has jurisdiction to award an injunction restraining proceedings in a state court commenced after the adjudication in bankruptcy for the foreclosure of a mortgage upon property in the possession of the assignee until the validity of the mortgage is determined. *In re Kerosene Oil Co.*, 2 N. B. R. 164; 3 Ben. 85; 2 Amer. Law T. Rep. Bankr. 79; Fed. Cas. 7,725.

23. Bankrupt court has jurisdiction to enjoin parties from proceeding to judgment and execution in state court during pendency of proceedings in bankruptcy. *In re Penny v. Taylor*, 10 N. B. R. 200; Fed. Cas. 10,957.

24. The marshal and the assignee may bring suit in the circuit court to set aside as fraudulent a transfer believed to be for the purpose of defrauding the creditors, and the court may issue an injunction to restrain proceedings in a state court against the marshal and assignee. *Kellogg, Ass., et al. v. Russell et al.*, 11 N. B. R. 121; 11 Blatchf. 519; Fed. Cas. 7,666.

25. A state court will not grant an injunction restraining a party from applying for the benefit of the bankrupt act of the United States. *Fillingim v. Thornton*, 12 N. B. R. 92.

26. Parties to an action pending in a state court may be enjoined by the district court from proceedings to take property from the possession of the assignee by a writ of sequestration. *Hewett, Ex'r, v. Norton, Ass.*, 13 N. B. R. 276; 1 Woods, 68; 1 N. Y. Wkly. Dig. 535; Fed. Cas. 6,441.

27. Injunction issued by the district court restraining state court until the question of discharge is determined is terminated by discharge. *In re Thomas*, 3 N. B. R. 7; Fed. Cas. 13,890.

(f) *To Restrain Sheriff.*

28. The bankruptcy court has the power to restrain the sheriff of the state court from levying on the property of the bankrupt to satisfy a judgment of the latter court, although judgment obtained prior to the adjudication of bankruptcy. *In re Mallory*, 6 N. B. R. 22; 1 Sawy. 88; Fed. Cas. 8,991.

29. A sheriff, on an execution from state court, collected from the defendant amount due on a *fi. fa.*, and was eight days afterwards, by the district court, enjoined from interfering with or disposing of the "bankrupt's property." *Held*, this injunction was a sufficient answer for the sheriff to make to an order from the plaintiff requiring him to pay over the money. *Mills et al. v. Davis et al.*, 10 N. B. R. 340.

30. T., who had filed a voluntary petition in bankruptcy in eastern district of New York, filed petition in southern district of New York to restrain sale by sheriff on execution and to enjoin creditor from selling certain property of bankrupt on which sheriff had made a levy. *Held*, that while court could not restrain creditor who was beyond reach of process, yet it would restrain sheriff. *In re Tift*, 19 N. B. R. 201; Fed. Cas. 14,034.

(g) *In General.*

31. An injunction restraining defendants, to whom a bankrupt had fraudulently assigned his property, from interfering with the assigned property or the proceeds thereof, will be sustained. *Sedgwick v. Menck et al.*, 1 N. B. R. 108; Fed. Cas. 12,617.

32. Where, at the time a firm is adjudged bankrupt, there is pending an action for accounting by one partner against the other, the right to continue the suit passes to the assignee, and such partner will be enjoined from further proceeding. *In re Clark & Binger*, 3 N. B. R. 123; 4 Ben. 88; 1 Amer. Law T. Rep. Bankr. 189; Fed. Cas. 2,798.

33. The bankrupt court has the power under section 1 to restrain a claimant from proceeding elsewhere to enforce his claim (act of 1867). *Samson v. Burton*, 6 N. B. R. 403.

34. Where funds belonging to a bankrupt have been misused, the wrong-doers will be enjoined from collecting rents from the real estate in which the bankrupt has any legal

or equitable interest. *Keenan v. Shannon et al.*, 9 N. B. R. 441; 10 Phila. 219; 81 Leg. Int. 85; Fed. Cas. 7,640.

35. The powers of a bankruptcy court would accomplish little in dividing the estate among the creditors if it did not possess the power to grant an injunction. *Mills et al. v. Davis et al.*, 10 N. B. R. 840.

36. Creditor filed petition in New York against B., who was a resident of New York but did business in New Jersey. B. had been adjudicated bankrupt in New Jersey and said proceedings were then pending. *Held*, that adjudication should be set aside and proceedings stayed pending proceedings in New Jersey. *In re Brown*, 19 N. B. R. 270; Fed. Cas. 1,982.

37. An action of trover against a marshal for taking possession, under a warrant in bankruptcy, of certain goods claimed by plaintiff, may be enjoined by the circuit court. *Hudson, Ass. v. Schwab et al.*, 18 N. B. R. 480; 26 Pittsb. Leg. J. 140; Fed. Cas. 6,835. *Contra*, *In re Marks*, 2 N. B. R. 175; 16 Pittsb. Leg. J. 12; 1 Chi. Leg. News, 245; Fed. Cas. 9,095.

## II. WILL NOT BE GRANTED.

### (a) *Unless Bankruptcy Proceedings Are Begun.*

38. A bankrupt filed a petition setting forth that, prior to his filing his petition in bankruptcy, certain creditors had obtained judgment against him and had levied execution, and were seeking a decree to sell his lands. He asked an injunction. The petition was dismissed. *In re Bowie*, 1 N. B. R. 185; 15 Pittsb. Leg. J. 448; 1 Amer. Law T. Rep. Bankr. 97; Fed. Cas. 1,728.

39. A United States district court will not interpose by injunction to restrain proceedings against a bankrupt in a state court, unless bankruptcy proceedings are pending therein. *In re Richardson*, 2 N. B. R. 74; 2 Ben. 517; 2 Amer. Law T. Rep. Bankr. 20; Fed. Cas. 11,774.

40. No injunction should be granted to enjoin the enforcement of a judgment affirmed on appeal, appellant having been adjudicated a bankrupt on his own petition and regularly discharged, when the judgment

sought to be enjoined was a debt created by the fraud of the plaintiff. *Flanagan v. Pearson*, 14 N. B. R. 37.

### (b) *In General.*

41. An injunction restraining a creditor, who had issued an execution on a judgment, from selling an alleged homestead, was refused bankrupt. *In re Hunt*, 5 N. B. R. 493; 4 Chi. Leg. News, 5; 2 Pac. Law Rep. 146; Fed. Cas. 6,883.

42. Proceedings *ex delicto* against a debtor in a state court, on account of fraud, are not suspended by proceedings in bankruptcy, nor can the United States court restrain such proceedings. *Horter et al. v. Harlan*, 7 N. B. R. 288. But see *In re Schwarz*, 15 N. B. R. 330; 14 Blatchf. 196; 52 How. Pr. 513; 15 Alb. Law J. 350; Fed. Cas. 12,503.

43. Where a judgment against a bankrupt is valid, the judgment debtor ought not to be restrained from selling any alleged interest of bankrupt. The plaintiff should be allowed to sell, and the purchaser can then try his title by ejectment. *Reeser v. Johnson*, 10 N. B. R. 467.

44. Where plaintiff bought notes of a bankrupt on a speculation, and sought to set them off against judgment, bankrupt will not be enjoined from levying judgment recovered by the bankrupt against plaintiff. *Hunt v. Holmes et al.*, 16 N. B. R. 101; Fed. Cas. 3,890.

45. A district court will not grant an injunction to restrain a mortgagee from prosecuting a suit in trover against the purchaser of mortgaged property sold by the assignee of a bankrupt without an order of court. *In re Cooper*, 16 N. B. R. 178; Fed. Cas. 3,190.

46. A bankrupt filed an answer to a suit in a state court pending composition proceedings and before they could be set up as a defense. The composition perfected he applied for leave to put in a supplemental answer, which was refused and judgment by default was taken against him. He then applied for an injunction in the bankruptcy court restraining the enforcement of the judgment. The injunction was refused. *In re Nebenzahl*, 17 N. B. R. 23; 9 Ben. 243; Fed. Cas. 10,074.

47. An injunction should not issue stay-



ing proceedings on an order to show cause why the bankrupt should not be punished for contempt for not obeying an order in proceedings supplemental to execution. In *re Hill*, 2 N. B. R. 53; Fed. Cas. 6,486.

48. Unless substantial advantage will accrue to creditor, proceedings under levies made prior to filing of petition in bankruptcy will not be enjoined. In *re Wilbur*, 3 N. B. R. 71; 1 Ben. 527; Fed. Cas. 17,633.

### III. CONTEMPT.

49. In answer to a motion to punish A. for contempt of court in violating an injunction and in disturbing the possession of a receiver appointed by order of a state court, A. urged authority as assignee in bankruptcy to demand and receive possession of the property. *Held*, that the bankrupt court had no authority to oust the jurisdiction of the state court, and that A. was guilty of contempt. *Clark v. Bininger*, 3 N. B. R. 129.

50. A mortgagee of chattels, having been enjoined from enforcing his mortgage, is guilty of contempt by replevying the goods, and is condemned to a fine equal to the expense he has occasioned the owner of the property in the premises. In *re Feeny*, 4 N. B. R. 69; 1 Hask. 304; Fed. Cas. 4,715.

50a. A creditor who had obtained judgment in a state court and issued execution before his debtor was adjudged bankrupt was restrained from selling the property by an injunction of the United States court, but in defiance of this injunction the property was sold. *Held*, that contempt was committed. In *re Atkinson*, 7 N. B. R. 143; 3 Pittsb. Rep. 423; 5 Amer. Law T. Rep. 320; Fed. Cas. 606.

51. Attaching creditors enjoined from proceeding against the property attached, and making no effort to stop proceedings, were guilty of contempt. *Hyde v. Bancroft et al.*, 8 N. B. R. 24; Fed. Cas. 6,966.

52. Where C., as attorney, with knowledge of pending bankruptcy proceedings of his client, commenced an action against a railroad company, obtained judgment and sought to secure appointment of receiver for his client, and an injunction was issued restraining C. from proceeding with his application for a receiver, C. was guilty of con-

tempt for having receiver appointed. In *re South Side R. R. Co.*, 10 N. B. R. 274; 7 Ben. 391; Fed. Cas. 13,190.

### IV. MODIFICATION.

53. Where it is thought desirable, in order to obtain a better price for property, an injunction will be so far modified that the sale may take place under a judgment and the referee may unite in the deed. In *re Hanna*, 4 N. B. R. 139; 4 Ben. 469; 5 N. B. R. 292; Fed. Cas. 6,026.

54. Creditors having obtained an injunction from the bankrupt court restraining sale under execution, the judgment creditors petitioned for an order permitting sale, which was granted, with a direction to the sheriff to pay the proceeds into court. The judgment creditors were bound by the court's order and could not recover the proceeds of sale in suit against sheriff. *O'Brien v. Weld et al.*, 15 N. B. R. 405; 92 U. S. 81.

55. An assignee applied to the district court and obtained an injunction to restrain the sale of property under the decree of foreclosure of a mortgage after the proceedings had reached a stage where, substantially, all the expenses, except those which would attend any sale of the property, had been incurred. He then applied for leave to dissolve the injunction and sell the property. *Held*, that the petition must be dismissed, with costs to the assignee, because he had not applied earlier for a stay. In *re Brinkman*, 6 N. B. R. 541; Fed. Cas. 1,883.

56. An injunction was modified so as to allow a sheriff to sell attached property, provided he deposited proceeds subject to further order of court. *Held*, that order must be strictly followed, and deposit could not be dispensed with by consent. In *re Mickel et al.*, 19 N. B. R. 374; Fed. Cas. 9,529.

### V. NOTICE.

57. Notice was filed to dissolve injunction restraining third persons from interfering with bankrupt's goods, on the ground that the injunction was issued without notice. *Held*, that notice was not necessary. In *re Muller & Brentano*, 3 N. B. R. 86; Deady, 513; 2 Amer. Law T. Rep. Bankr. 83; Fed. Cas. 9,912.

58. A restraining order directed to the debtor and "all other persons" need not contain the names of those persons if the order is served upon the persons to be restrained. In *re Lady Bryan Mining Co.*, 6 N. B. R. 252; Fed. Cas. 7,980.

## VI. PRACTICE.

59. District courts of the United States have jurisdiction to restrain by injunction any interference with the estate of the bankrupt, and may award the same upon petition. In *re Wallace*, 2 N. B. R. 53; *Deady*, 483; 8 Amer. Law Rev. 174; 1 Chi. Leg. News, 30; Fed. Cas. 17,094.

60. Bankrupt filed in circuit court a petition for a review of decree adjudging him a bankrupt, and at the same time had proceedings pending in state court for an injunction restraining creditors from continuing proceedings in bankruptcy. *Held*, that he was entitled to prosecute his petition for review. In *re Bininger & Clark*, 8 N. B. R. 122; 7 Blatchf. 165; 1 Amer. Law T. Rep. Bankr. 186; Fed. Cas. 1,418; In *re Bininger & Clark*, 3 N. B. R. 122; 7 Blatchf. 168; 1 Amer. Law T. Rep. Bankr. 187; Fed. Cas. 1,419.

61. Where an injunction has been granted by the court, a motion to dissolve is the proper procedure and not a petition to dissolve. In *re Mallory*, 6 N. B. R. 22; 1 Sawy. 88; Fed. Cas. 8,991.

62. An injunction having been granted by the bankruptcy court to restrain the sheriff from selling under an execution from the state court, a petition was filed by the judgment creditor to dismiss the injunction. *Held*, a motion to dissolve the injunction would have been the correct proceeding. *Id.*

63. After adjudication of bankruptcy, the appointment of an assignee, and conveyance by the register of the estate of the bankrupt, the holder of a mortgage on property of the bankrupt brought foreclosure proceedings in a state court, making the assignee a party. *Held*, assignee should apply for injunction. In *re Brinkman*, 7 N. B. R. 421; Fed. Cas. 1,884.

64. Where motion was made for an injunction to restrain execution creditors from realizing on their lien, no bills in equity having been filed, there is nothing on which a motion for injunction can rest. In *re Weamer*, 8 N. B. R. 527.

65. A bill praying an injunction may be sworn to by an agent of the petitioner. In *re Fendley*, 10 N. B. R. 250; 3 Amer. Law Rec. 105; Fed. Cas. 4,728.

66. If a bankrupt appears and moves for a stay of proceedings in a suit in a state court to foreclose a mortgage, the portion of the suit asking a personal judgment should be stayed. *McKay v. Funk*, 13 N. B. R. 334.

67. Where a bankrupt applied for an injunction to restrain the collection of a judgment on the ground that he had been discharged, and the record showed nothing giving the bankrupt court jurisdiction, the jurisdiction will be presumed. *Hayes v. Ford*, 15 N. B. R. 569.

68. The granting of a rehearing and the granting or dissolving of a temporary injunction are always in the sound discretion of the court and therefore furnish no ground of appeal. *Buffington v. Harvey, Ass.*, 17 N. B. R. 474; 95 U. S. 99.

69. A first mortgage on bankrupt's real estate was uncontested, but the holder was enjoined from proceeding to foreclose. On motion to dissolve injunction, it being shown that A.'s rights would not be affected by adjudication, the motion was denied. In *re Duryea*, 17 N. B. R. 495; Fed. Cas. 4,196.

70. When issued on a creditor's petition an injunction should conform to the language of the statute. In *re Keiler et al.*, 18 N. B. R. 10; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 7,647.

## VII. UNTIL ADJUDICATION.

71. The restraining power of the bankrupt court is limited, under section 40 of the act of 1867, to the time of hearing and adjudication. If creditors desire further restraint it must be obtained from a court of equity. In *re Moses*, 6 N. B. R. 181; Fed. Cas. 9,869.

72. On filing a petition in bankruptcy an injunction was issued under section 40, restraining the alienation of the debtor's property. After the adjudication the attempt was made to enforce this injunction by proceedings for contempt. *Held*, injunction only in force until adjudication. *Id.*

73. Section 40 of the act of 1867 refers to injunctions granted simultaneously with the order to show cause, and is not applicable to

injunctions granted at the commencement of proceedings and the date of adjudication, or the appointment of an assignee. In re Fendley, 10 N. B. R. 250; 8 Amer. Law Rec. 105; Fed. Cas. 4,728.

74. An injunction issued under section 5024, Revised Statutes, and restraining a person "in the meantime and until the hearing and decision on the said petition, and until the further order of the court," ceases to operate as soon as the debtor is adjudged bankrupt. *Irving v. Irving*, 14 N. B. R. 289; 8 Ben. 463; 2 N. Y. Wkly. Dig. 500; Fed. Cas. 7,073.

### VIII. IN GENERAL.

75. Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing in any stage of them after the execution of the assignment. In re Hafer et al., 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 164; Fed. Cas. 5,897.

76. An execution creditor who has been enjoined from further proceedings by an injunction may have his rights to priority determined by the assignee in bankruptcy, at a general meeting of creditors, under section 27 of the act of 1867. In re Dunkle & Dreisbach, 7 N. B. R. 72; Fed. Cas. 4,160.

77. A debtor, at the time under injunction by the bankrupt court from making any transfer of his property, suspended payment of commercial paper for fourteen days. *Held*, not an act of bankruptcy (act 1867). In re Pratt, 9 N. B. R. 47; 6 Ben. 165; 21 Pittsb. Leg. J. 82; Fed. Cas. 11,369.

78. When prior to bankruptcy proceedings a bill was filed by certain stockholders praying an injunction to prevent certain contemplated fraudulent acts, and a receiver, which latter was appointed, and later a petition in bankruptcy filed and an assignee appointed, a motion made to discharge the receiver and transfer the property to the assignee should be denied. *Myer et al. v. Crystal Lake P. & P. W.*, 14 N. B. R. 9.

79. A state court, in pursuance of a resolution of composition, having granted an *ex parte* order discharging the voluntary assignee, so far as the confirmation of the composition affected creditor's rights, and pur-

suant to the resolution the property and books were delivered by the assignee to the debtor, and a creditor whose debt was contracted by the debtor's fraud, and who refused to accept the composition notes, moved in the state court to vacate the order of discharge and for an inspection of the books, the creditor's act was in violation of the composition and should be enjoined. In re Rodger et al., 18 N. B. R. 381; Fed. Cas. 11,992.

80. When a petition for an injunction against other parties than the debtor is united with a petition in involuntary bankruptcy, injunction will be provisional. In re Kintzing, 8 N. B. R. 52; Fed. Cas. 7,833.

81. When it appears that the statute of limitations will run against a claim, or that bankrupt cannot be served, or that testimony might be lost, leave to sue will be granted and proceedings then stayed until discharge. In re Ghirardelli, 4 N. B. R. 42; 1 Sawy. 343; Fed. Cas. 5,376.

### INSANITY.

1. A person cannot commit an act of bankruptcy while insane, but if he becomes insane after committing the act he can be proceeded against in bankruptcy. In re Pratt, 6 N. B. R. 276; 2 Lowell, 96; Fed. Cas. 11,371.

2. A party who is under guardianship as a lunatic may be proceeded against in involuntary bankruptcy in opposition to the wishes of his guardian. If the person was insane at the time of the commission of an alleged act of bankruptcy, he cannot be adjudged a bankrupt for that act. In re Weitzel, 14 N. B. R. 466; 7 Biss. 289; 3 Cent. Law J. 557; Fed. Cas. 17,365.

3. A lunatic may be sued at law after the execution of the commission of lunacy. *Id.*

4. B. was adjudged an involuntary bankrupt upon default. The assignee made no distribution. Subsequently bankrupt filed affidavits alleging that he was *non compos mentis* at the time debts were created, and also at the time of proceedings against him and until a recent period. *Held*, that application to set aside the default and subsequent adjudication should be granted, and B. now allowed to show cause why he should not be adjudged a bankrupt. In re Murphy, 10 N. B. R. 48; Fed. Cas. 9,946.

**INSOLVENCY.****I. IN GENERAL.****II. INABILITY TO PAY DEBTS.**

- (a) *In General.*
- (b) *Debtor's Knowledge.*
- (c) *Present Inability.*
- (d) *Sale of Property.*

**III. ORDINARY COURSE OF BUSINESS.****IV. REASONABLE CAUSE TO INFER INSOLVENCY.**

See PREFERENCES, 88, 42, 79, 122, 157, 227.

**I. IN GENERAL.**

See PETITIONS, 141.

1. An insolvent debtor commits an act of bankruptcy by confessing judgment and allowing his property to be taken on an execution issued thereupon, with intent to give a preference to a creditor. His insolvency or contemplation thereof must be averred and shown. *In re Craft*, 1 N. B. R. 89; 2 Ben. 214; Fed. Cas. 8,316.

2. There is nothing in the bankrupt law which prevents an insolvent from dealing with his property prior to institution of bankruptcy proceedings against him, if such dealing be conducted without any purpose to delay or defraud his creditors, or to give a preference, and the value of the estate be not impaired. *Clark, Ass., v. Iselin*, 11 N. B. R. 387; 21 Wall. 860.

3. One who is insolvent and undertakes to make a final distribution of his assets must do it through the bankrupt court. *In re Union Pacific R. Co.*, 10 N. B. R. 178; 6 Chi. Leg. News, 355; 8 Amer. Law Rev. 779; 81 Leg. Int. 261; Fed. Cas. 14,376.

4. The court may properly charge the jury "That if the jury find that the quantity and value of the assets of the debtor had not materially diminished from the date when the judgment note was given till the day when he filed his petition in bankruptcy, and the day when he was adjudged a bankrupt, they may find that he was insolvent when he gave the judgment note." *First Nat. Bank of Clarion v. Jones, Ass.*, 11 N. B. R. 881; 21 Wall. 825.

5. Bankrupt laws discharge the contract as contradistinguished from insolvent laws,

which liberate only the person. *Deford et al. v. Hewlett*, 18 N. B. R. 518.

6. On motion to set aside an adjudication of bankruptcy against a corporation procured by petition of a trustee, *held*, that the question of insolvency could not be examined. *In re Atlantic Mut. Life Ins. Co.*, 18 N. B. R. 541; 9 Ben. 270; 16 Alb. Law J. 453; 24 Int. Rev. Rec. 18; Fed. Cas. 628.

**II. INABILITY TO PAY DEBTS.****(a) In General.**

7. Insolvency, within the meaning of the bankrupt act, means inability to pay debts in the ordinary course of business, as persons carrying on business usually do (1867). *Merchants' Nat. Bank of Hastings v. Truax*, 1 N. B. R. 146; 1 Amer. Law T. Rep. Bankr. 78; Fed. Cas. 9,451; *In re Gay*, 2 N. B. R. 114; 1 Hask. 108; Fed. Cas. 5,279; *In re Kingsbury et al.*, 3 N. B. R. 84; Fed. Cas. 7,816; *Hardy et al. v. Bininger et al.*, 4 N. B. R. 77; Fed. Cas. 6,057; *Martin v. Toof et al.*, 4 N. B. R. 158; 1 Dill. 218; Fed. Cas. 9,167; *Toof v. Martin*, 6 N. B. R. 49; 18 Wall. 40; *Jackson, Ass., v. McCulloch et al.*, 18 N. B. R. 283; 1 Woods, 438; 1 N. Y. Wkly. Dig. 534; Fed. Cas. 7,140.

8. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process, is insolvent. *In re Randall & Sunderland*, 3 N. B. R. 4; *Deady*, 557; 1 Chi. Leg. News, 209; Fed. Cas. 11,551.

9. A mercantile firm having no property but their stock in trade are insolvent within any accepted or sound definition of that term as used in the act of 1867, who, when pressed for a debt admitted to be just, give as a reason that they are unable to pay it, and suffer judgment to be rendered against them. *Wilson v. City Bank of St. Paul*, 5 N. B. R. 270.

10. Inability to pay commercial paper in the due course of business is, in the case of a merchant, insolvency (1867). *Warren v. Tenth Nat. Bank et al.*, 7 N. B. R. 481; 10 Blatchf. 498; Fed. Cas. 17,202.

11. A trader unable to pay his debts in the ordinary course of business is insolvent *prima facie*, and it is incumbent on him to show that he is not so in fact; but the rule

does not apply with the same strictness to a farmer, and as to him the rule as to the burden of proof is reversed (1867). In *re Miller v. Keys*, 3 N. B. R. 54; Fed. Cas. 9,578.

12. A person is held to be insolvent when he is unable to discharge his debts in the usual course of business of persons engaged in the same trade or occupation. *Stranahan v. Gregory & Co.*, 4 N. B. R. 142; Fed. Cas. 13,522.

13. In large commercial centers, a failure to meet payments as they become due is deemed insolvency, but in the country the custom of traders is generally different. A person should be held insolvent only when he fails to meet his debts according to the custom of the place of his business. *Hall, Ass. etc., v. Wager & Fales*, 5 N. B. R. 181; 8 Biss. 28; 5 West. Jur. 588; 3 Chi. Leg. News, 401; Fed. Cas. 5,951.

### (b) *Debtor's Knowledge.*

See ESTATES, 251.

14. Where a party cannot pay his debts in the ordinary course of business, and knows that he cannot, he will be held to have had knowledge of his insolvency. *Martin v. Toof et al.*, 4 N. B. R. 158; 1 Dill 203; Fed. Cas. 9,167.

15. Merchants who are not able to pay all their debts in the usual and ordinary course of business as persons carrying on trade usually do, are insolvent, and know themselves to be insolvent, and the transfer of their property to certain of their creditors under such circumstances is a fraudulent preference. In *re Lewis et al.*, 2 N. B. R. 145.

### (c) *Present Inability.*

See CONVEYANCES, 76.

16. Insolvency, as used in section 39 of the act of 1867, means a simple inability to pay as debts shall become payable. In *re Black and Secor*, 1 N. B. R. 81; 2 Ben. 196; Fed. Cas. 1,457.

17. Insolvency is a present inability to pay debts when due, even when there is surplus property more than enough to pay them at some future time. *Morgan et al. v. Mastick*, 2 N. B. R. 163; Fed. Cas. 9,803.

18. Although the assets of a debtor are

largely in excess of his liabilities, yet he is insolvent if he be unable to meet his engagements as they accrue. In *re Woods*, 7 N. B. R. 126; 29 Leg. Int. 236; 20 Pittsb. Leg. J. 21; Fed. Cas. 17,990.

19. A merchant who had transferred some of his assets as claimed, in fraud of creditors, held property enough so that if it were advantageously disposed of it might pay all his debts. He failed, however, to pay a few small debts as they became due. *Held*, insolvent. *Ecfort & Petring v. Greely*, 6 N. B. R. 433; 4 Chi. Leg. News, 209; Fed. Cas. 4,260.

20. A merchant is insolvent when he is unable to pay his debts in the ordinary course of business, even though if given time to realize on his assets he may be able to pay them in full. In *re Hauck & Co.*, 17 N. B. R. 158; Fed. Cas. 6,219.

21. A trader is insolvent if he is unable to pay his debts as they accrue, even though he might have paid them if time had been given for that purpose (1867). *Webb, Ass. v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

22. The term "insolvency," when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement of his affairs, but a present inability to pay in the ordinary course of his business; and that a trader is insolvent when he cannot pay his debts in the ordinary course of business as men in trade usually do, although his inability be not so great as to compel him to stop business, and although he may be able to pay them at a future time, upon the winding up of his concerns (1867). *Rison v. Knapp*, 4 N. B. R. 114; 1 Dill 186; Fed. Cas. 11,861.

23. A trader is insolvent, within the meaning of section 35 of the bankrupt act of 1867, when he is unable to pay his debts as they mature in the ordinary course of business, and not merely when his liabilities exceed his assets. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

### (d) *Sale of Property.*

See SALE, 98.

24. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary

and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankrupt act. In *re Randall & Sunderland*, 3 N. B. R. 4; *Deady*, 557; 1 Chi. Leg. News, 209; Fed. Cas. 11,551; In *re Wells*, 3 N. B. R. 95; 2 Chi. Leg. News, 49; Fed. Cas. 17,888.

25. If a debtor's property, put up for sale on reasonable notice, where it exists under the circumstances of the case, will not bring enough cash to pay his debts, he is insolvent. In *re Oregon Bulletin Printing and Publishing Co.*, 13 N. B. R. 508; 1 Cin. Law J. 87; Fed. Cas. 10,559.

26. Commercial insolvency under the bankrupt law is the inability of a merchant, banker, trader, manufacturer or miner to meet his commercial debts as they fall due in the usual course of business; not that his property, when sold under legal process, is insufficient to pay all his debts (1867). *Harrison v. McLaren*, 10 N. B. R. 244; Fed. Cas. 6,139.

### III. ORDINARY COURSE OF BUSINESS.

27. The ordinary course of business does not mean an ability to turn out goods, or bills receivable, or assets or securities, to pay one particular debt, at the same time leaving other debts which are certain to come due unprovided for, and not leaving sufficient assets in the hands of the debtor to meet them when they come due. In *re Dibblee*, 2 N. B. R. 185; 3 Ben. 283; 1 Chi. Leg. News, 355; Fed. Cas. 3,884.

28. In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation. *Rison v. Knapp*, 4 N. B. R. 114; Fed. Cas. 11,861.

29. Where a stock of goods which had been mortgaged was taken by the assignee and sold by order of court, and the money held subject to its order, and the mortgagee filed a petition claiming same, *held*, that the petition must be dismissed, as the mortgage was out of the ordinary course of business,

the mortgagor being a retail dealer, and a mortgage of the whole of his stock was a confession of insolvency. If the mortgage had been made directly to a creditor it would have been an act of bankruptcy. In *re Butler*, 4 N. B. R. 91.

### IV. REASONABLE CAUSE TO INFER INSOLVENCY.

30. A merchant or trader who cannot pay his debts in the ordinary course of his business is insolvent. A creditor who knows that his debtor cannot pay all his debts in the ordinary course of his business has reasonable cause to believe him to be insolvent. *Wilson v. Brinkman*, 2 N. B. R. 149; 1 Chi. Leg. News, 193; Fed. Cas. 17,794.

31. A creditor, dealing with a person whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the law, although he is unwilling to trust him further and is anxious about his claim, and has a strong desire to secure it. If such belief as the act requires is wanting, the obtaining of additional security or receiving payment is not provided by law. *Stuckey v. Masonic Savings Bank*, 108 U. S. 74.

32. A creditor has reasonable cause to believe that his debtor is insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of business. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 331; 94 U. S. 553.

33. A debtor was insolvent and the creditor might have ascertained the fact by reasonable inquiry. It did not appear that he made any inquiries as to his pecuniary standing except from one other creditor. In an action to recover securities transferred to the creditor, *held*, that he had reason to believe that the debtor was insolvent. *Id.*

34. Where a debtor is in fact insolvent and a creditor has notice of a state of facts constituting in law such insolvency, there arises a presumption of actual knowledge, which is conclusive until rebutted by proper

proof. In re Hauck, 17 N. B. R. 158; Fed. Cas. 6,219.

35. In a mercantile community the non-payment of a note at maturity by the maker, who is a merchant or trader, is *prima facie* evidence of insolvency, and warrants a decree in bankruptcy. In an agricultural country the rule is different, and there no man is suspected of being insolvent from the fact alone that his notes are not paid promptly at maturity. Shaffer v. Fritchery et al., 4 N. B. R. 179; Fed. Cas. 12,897.

36. A plaintiff purchased notes of the defendant, with knowledge of the failure of the latter, the same being bought between the date of suspension and the filing of the petition in bankruptcy. Held, that the plaintiff had constructive knowledge of each suspension of payment (1867). Hunt v. Holmes et al., 16 N. B. R. 101; Fed. Cas. 6,890.

37. Where repeated demands for payment are met by promises to pay at specified times, which are not kept, and where a creditor knows that the debtor has other debts greater in amount than his own, he will be presumed to know that the debtor is insolvent, if in fact he is. In re Armstrong, 16 N. B. R. 275; 9 Ben. 212; Fed. Cas. 539.

38. The simple fact that a man doing a large business pays, under special circumstances, a large discount for a loan, is not notice of insolvency to the creditor, it being shown that at the time similar commercial paper was selling at high rates. Golson et al. v. Neihoff et al., 5 N. B. R. 56; 2 Biss. 434; Fed. Cas. 5,524.

39. A corporation that is unable to pay its debts as they become due, in the ordinary course of its daily transactions, is insolvent, and a creditor may be said to have reasonable cause to believe in the existence of such insolvency when such state of facts is brought to his notice, respecting the pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that the debtor was unable to meet his obligations as they matured in the ordinary course of business. Buchanan et al. v. Smith, 7 N. B. R. 513; 16 Wall. 277.

40. Where a party knows at the time of purchasing goods that the bankrupts had failed in business, and that his vendors held the goods under a mortgage from the bank-

rupts, these facts are sufficient to put him upon his guard, and he is bound to inquire into the transactions between the bankrupts and his own vendors. Rison v. Knapp, 4 N. B. R. 114; Fed. Cas. 11,861.

41. Where creditors have accounts overdue seven or eight months, and finally have to resort to legal measures for the collection of them, they must be considered as having reasonable cause to believe their debtor insolvent, and money received under these circumstances must be paid to the debtor's assignee in bankruptcy, together with interest and costs of the proceedings instituted by the assignee for the recovery of the money. Stranahan v. Gregory & Co., 4 N. B. R. 142; Fed. Cas. 18,522.

42. A deed taken because the grantor was unable to pay the money which it was given to secure is itself the evidence of insolvency, and the party accepting it accepts the most conclusive confession, proof and notice of insolvency. Alderdice, Ass., v. State Bank of Virginia et al., 11 N. B. R. 398; 1 Hughes, 47; Fed. Cas. 154.

43. Provided the debtor does nothing to aid him, a creditor may pursue his insolvent debtor to judgment and execution, with knowledge of the insolvency, notwithstanding the provisions of the bankrupt act of 1867. Clark, Ass., v. Iselin, 11 N. B. R. 337; 21 Wall. 360.

44. No creditor who has received a preference, having at the time reasonable cause to believe his debtor insolvent, is authorized to institute proceedings in bankruptcy. Ecker v. McAllister, 17 N. B. R. 42.

## INSOLVENT LAWS.

See BANKRUPTCY LAW, 1; CONSTITUTIONAL LAW, 7.

## INSURANCE.

### I. FIRE.

### II. LIFE.

See CLAIMS, IX, (g); COMMERCIAL PAPER, 86; CORPORATIONS, 39, 40; ESTATES, 149, 220; PETITIONS, 84; PLEADING AND PRACTICE, 60; REFEREE, 33; STOCKHOLDERS, 26.

## I. FIRE.

See CLAIMS, 171, 172; ESTATES, 221; MORTGAGES, 87.

1. If the loss has been duly and regularly adjusted in good faith before the company was adjudicated a bankrupt, the claim can be proven like any other debt without regard to the year-clause of the policy. In re Firemen's Ins. Co., 8 N. B. R. 123; 3 Biss. 462; 5 Chi. Leg. News, 265; Fed. Cas. 4,796.

2. The policy of a fire insurance company prescribed rules for the proof of loss, and provided that suit on any claim arising by virtue thereof should be commenced within one year from the incurrence of the loss. The holder had made no proof of loss as required to the company or assignee, nor made proof of debt in proceedings in bankruptcy, nor commenced suit within a year after the loss occurred. *Held*, that the assignee in bankruptcy should not allow his claim. *Id*.

3. Proofs of loss by fire were presented by the insured and payment demanded, no objection being made to the proofs at the time. *Held*, that the right to object had been waived. In re Republic Ins. Co., 8 N. B. R. 197; 3 Ins. Law J. 390; 5 Chi. Leg. News, 385; Fed. Cas. 11,705.

4. Where a policy of insurance contains a provision that it shall be void if the property insured shall be sold or transferred or any change take place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, it becomes void upon the bankruptcy of the insured and the appointment of an assignee. *Perry v. Lorillard Fire Ins. Co.*, 14 N. B. R. 339.

## II. LIFE.

See LIMITATIONS, STATUTE OF, 53.

5. A policy of insurance as a security is not, within the language of section 19 of the bankrupt act of 1867, "a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to the creditor from the bankrupt;" but, nevertheless, the creditor must, in some proper way, credit on the debt the present value of the security. In re Newland, 7 N. B. R. 477; 6 Ben. 342; Fed. Cas. 10,170.

6. When a debtor at his own expense ef-

fects an insurance on his life, as security to a creditor, the representative of the debtor is entitled to the surplus after the debt is paid. If such a debtor, in his life-time, pay the debt, he is entitled to have the policy delivered up to him. *Id*.

7. A creditor took out an insurance on the life of his debtor as security and paid all the premiums; proved his debt in bankruptcy; received dividends thereon; and received in full the original amount of the debt from the insurance company upon the death of the bankrupt prior to the declaration of the last dividend. *Held*, that, after deducting the premiums with interest, the creditor must pay to the assignee all over the amount sufficient, with the dividends and payments previously made, to pay the debt in full. *Id*.

8. The amount of premiums paid by a husband, after he became insolvent, on life insurance policies taken out upon his life for the benefit of his wife may be claimed by his creditors, and the claim may be sold for cash and become a lien on the policy, collectible when the policy shall be paid. In re Bear and Steinberg, 11 N. B. R. 46; 1 Cent. Law J. 607; Fed. Cas. 1,178.

9. Certain bankrupts did not include in the schedules some policies of life insurance which each had taken out for the benefit of his wife. *Held*, that the legal title to the policies was vested in the wives respectively and could not be assigned by the husbands, except such amount of premiums as may have been paid by the husbands after they became bankrupt. *Id*.

10. A bankrupt's wife took out a policy of insurance upon her life, payable on her death to her husband, the premiums on which she paid out of her separate estate, and died after the adjudication of bankruptcy. The policy was assigned and paid to the assignee. *Held*, that the bankrupt was entitled to recover the proceeds of the policy from the assignee. In re Owen & Murrin, 8 N. B. R. 6; Fed. Cas. 10,627.

## INTENT.

See ASSIGNMENT, 9; CONVEYANCES; INSOLVENCY, 7; PREFERENCES, VI.

1. The fraudulent intent on the seller's part is in every case an essential requisite to



establish the invalidity of a transfer of property. *Sedgwick v. Lynch*, 8 N. B. R. 289; 5 Ben. 489; Fed. Cas. 12,615.

2. If the exercise of the powers granted by an instrument would defeat or delay the operation of the bankrupt act, then such will be presumed to have been its intention. *In re Chamberlain et al.*, 8 N. B. R. 173; Fed. Cas. 2,574.

3. Where the forbidden intent and purpose exist in making an assignment, it is immaterial what are its terms, or how much or little of the assignee's property it conveys. *In re Goldschmidt*, 8 N. B. R. 41; 8 Ben. 379; Fed. Cas. 5,520.

4. A general assignment by a debtor of all his property for the benefit of, and to secure equal distribution among, all his creditors is not an act of bankruptcy, unless made with intent to hinder, delay or defraud his creditors or defeat the operation of the bankrupt act. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the law, unless it were meant to be so. *Langley v. Perry*, 2 N. B. R. 180; 8 Amer. Law Reg. (U. S.) 427; 16 Pittsb. Leg. J. 117; 2 Amer. Law T. Rep. Bankr. 84; Fed. Cas. 8,067.

5. The words "in contemplation of bankruptcy" do not require evidence of actual intent to file a petition in bankruptcy; it is sufficient if the bankrupt knew at the time that he would be unable to pay his debts and would be compelled to cease business. *In re Lawson*, 2 N. B. R. 125; Fed. Cas. 8,151.

6. A creditor, ignorant of his legal rights, will not be held, in the absence of proof of fraud, to intend what his acts imply, particularly if such creditor be acting in a fiduciary capacity. *In re Brand*, 8 N. B. R. 85; 2 Hughes, 334; Fed. Cas. 1,809.

7. Where an execution must necessarily stop the debtor's business, the execution creditor has, as a rule, reason to believe the debtor insolvent, and generally intends what would be a fraud on the provisions of the bankrupt act. *Hood et al. v. Karper et al.*, 5 N. B. R. 358; 8 Phila. 160; 28 Leg. Int. 340; Fed. Cas. 6,664.

8. The intent to delay and hinder creditors is a question of fact to be proved, but the testimony necessary to establish it need be of no higher order than is required to prove

any other fact. *In re Cowles*, 1 N. B. R. 42; 1 West. Jur. 367; Fed. Cas. 3,297.

9. Intent is to be proven as a fact, either by direct evidence or as the necessary and certain consequence of other facts clearly proved. *Morgan, Root & Co. v. Mastick*, 2 N. B. R. 163; Fed. Cas. 9,803.

## INTEREST.

### I. IN GENERAL.

#### II. ALLOWED.

#### III. NOT ALLOWED.

See USURY, 1, 9, 12.

### I. IN GENERAL.

See JUDGMENT, 57.

1. A creditor receiving property as a preference will be held liable to account for the value thereof, with interest from the time of the transfer. *Smith, Ass. v. McLean et al.*, 10 N. B. R. 260; Fed. Cas. 13,074.

### II. ALLOWED.

See BANKS, 36; CLAIMS, IX, (h), 196; PETITIONS, 71.

2. Interest is allowable which has accrued after the commencement of bankruptcy proceedings. *In re Bousfield & Poole Mfg. Co.*, 17 N. B. R. 153; Fed. Cas. 1,704.

3. A register made his report February 15, 1877. He allowed interest on claims to September 15, 1876. *Held*, that interest should have been allowed to the date of the report. *In re Devore*, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

4. A secured creditor is entitled to apply the proceeds of his security to the payment of his debt, and interest to the time of payment, when the contract provides that the principal shall bear interest until payment. *In re Haake*, 7 N. B. R. 61; 2 Sawy. 231; Fed. Cas. 5,863.

5. A proof of claim was objected to by the trustee, but upon re-examination was sustained. On motion for interest on the dividend, *held*, that interest should be allowed from the time the dividend became payable. *In re Kitzinger et al.*, 19 N. B. R. 238; Fed. Cas. 7,862.

6. A bank became bankrupt. After the payment of all claims at the amount computed to be due on the date of adjudication, a surplus remained, whereupon the creditors petitioned for interest from the date of the adjudication to the payment of the dividends. Petition granted. *In re Bank of North Carolina*, 12 N. B. R. 180; 1 N. Y. Wkly. Dig. 127; Fed. Cas. 895.

7. In a composition it makes no difference to what time interest is computed on a debt if all the debts be treated alike. *Beebe v. Pyle*, 18 N. B. R. 162.

8. A secured creditor claimed interest on unpaid instalments of interest after the maturity of the principal; also, immunity from any share of costs of the sale of the mortgaged property. *Held*, that the creditor was entitled to interest after the time specified for payment of the principal by operation of law and not by any provision of the contract. *In re Bartenbach*, 11 N. B. R. 61; 2 Amer. Law T. Rep. (N. S.) 33; Fed. Cas. 1,068.

9. The creditors of a bank in bankruptcy, whose estate has paid all debts, leaving a surplus, and the evidences of debt being the bills or notes of the bank, issued as money, are entitled only to interest on such notes from the date of the proof and filing of the bills before the register, and to entitle the holder of bank bills to interest, presentation, demand and refusal are prerequisites, and neither the suspension of payment nor the commencement of proceedings in bankruptcy will operate to change a circulating medium into an interest-bearing obligation. *Wilson and Shafer v. Bank of North Carolina*, 10 N. B. R. 289; 2 Hughes, 869; Fed. Cas. 894.

### III. NOT ALLOWED.

See CLAIMS, 214, X, (h); MORTGAGES, 153.

10. Where claims draw interest, the interest will stop at the date of filing the petition in bankruptcy. *In re Broich et al.*, 15 N. B. R. 11; 7 Biss. 303; Fed. Cas. 1,921.

11. Where interest in advance has been put into a note, and the maker is adjudged a bankrupt before it becomes due, the interest not yet due, though embraced in the note as principal, should be abated therefrom. *In re Riggs, Lechtenberg & Co.*, 8 N. B. R. 90.

12. Processes were sent to the marshal by

mail to the place where he resided, and they were served and were returned the same way. In his bill he charged interest on his fees. *Held*, that he was entitled to mileage for the processes so served, but the claim for interest was rejected. *In re Donahue & Page*, 8 N. B. R. 453; Fed. Cas. 3,979.

13. Certain judgments were obtained by default upon contracts made in the state of Virginia during the civil war, and embraced interest for the period of the war. One of the parties against whom one of the judgments was obtained thereafter became bankrupt. *Held*, that the amount of the contract should be scaled down to its equivalent in legal money, and that interest should not be allowed for the period of the war. *Fowler, Ass., v. Dillon et al.*, 12 N. B. R. 308; 1 Hughes, 232; Fed. Cas. 5,000.

### INTERPLEADER.

See INTERVENTION.

### INTERPRETATION.

See STATUTORY CONSTRUCTION.

### INTERVENTION.

I. WHO MAY INTERVENE.

II. WHO MAY NOT.

III. RIGHT NOT ABSOLUTE.

IV. IN GENERAL.

See PLEADING AND PRACTICE, 2, 263.

### I. WHO MAY INTERVENE.

See ADJOURNMENT, 10; COMPOSITION, 96; PETITION, 84, 87, XIV.

1. An involuntary proceeding in bankruptcy having been begun by one creditor, and another creditor petitioning to be admitted as a co-defendant, he should be admitted as having an interest. *In re Boston H. & E. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

2. Another creditor may intervene and be permitted to prosecute the original petition where the court is satisfied that the original petitioning creditor does not intend to prose-

cute the matter further, and the pending application of the original creditor to discontinue the proceedings is sufficient evidence in that regard. In *re Buchanan*, 10 N. B. R. 97; Fed. Cas. 2,073.

3. When a petitioning creditor abandons the proceedings, any other creditor may intervene, and on his application the court may proceed to an adjudication. Such right of intervention cannot be defeated by any arrangement between the bankrupt and any creditor, and any action of the court defeating such right of intervention is in violation of the statute. In *re Lacey, Downs & Co.*, 10 N. B. R. 477; 12 Blatchf. 322; Fed. Cas. 7,965.

4. If a conventional trustee, claiming title under an assignment, files a bill to recover assets belonging to the estate, the assignee may intervene by a supplemental bill. The *Collateral Security Bank v. Fowler, Tr.*, 12 N. B. R. 289.

5. An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy. In *re Mendelsohn*, 12 N. B. R. 533; 3 Sawy. 842; Fed. Cas. 9,420.

6. Attaching creditors have such an interest in the proceedings that they may intervene and oppose the adjudication, and they may contest the question as to the number and amount of creditors (act of 1867). In *re Scrafford*, 14 N. B. R. 184; 3 Cent. Law J. 252; Fed. Cas. 12,557.

7. An attaching creditor has a right to intervene after the default of the debtor and contest the commission of the alleged act of bankruptcy. In *re Jonas*, 16 N. B. R. 452; Fed. Cas. 7,442.

8. A general unsecured creditor who filed a petition requesting leave to intervene and contest a creditor's petition for adjudication was held entitled to be heard. In *re Austin et al.*, 16 N. B. R. 518; Fed. Cas. 662.

9. An adjudication may be opposed by a creditor who, prior to the filing of the petition, has obtained a lien upon the property of the alleged bankrupt by process of mesne attachment, and may intervene for that purpose. In *Burton et al.*, 17 N. B. R. 212; 9 Ben. 324; Fed. Cas. 2,214.

10. A firm expired by limitation and the interests of all the partners were transferred to one of them. Later he filed a voluntary

petition in bankruptcy and the firm assets and debts were included in his schedule. *Held*, that to the end of having the firm assets applied to the firm debts the other members could intervene and have the firm adjudicated. In *re Gorham*, 18 N. B. R. 419; 9 Biss. 23; 11 Chi. Leg. News, 58; 26 Pittsb. Leg. J. 112; Fed. Cas. 5,624.

## II. WHO MAY NOT.

See COURTS, 174.

11. Creditors will not be allowed to intervene, after the return day, to prosecute specifications filed by a creditor whose claim was stricken out after the filing of the specifications. In *re McDonald*, 14 N. B. R. 477; 24 Pittsb. Leg. J. 42; Fed. Cas. 8,753.

12. Where a creditor has obtained an attachment after the filing of a petition and issue of the order to show cause, he has no right to intervene and oppose an adjudication. In *re Vogel et al.*, 18 N. B. R. 165; 9 Ben. 498; Fed. Cas. 16,981.

## III. RIGHT NOT ABSOLUTE.

13. A creditor has no absolute right to intervene and oppose the discharge of a bankrupt after the return day of the order to show cause, though the proceedings may have been adjourned for other purposes, but it is within the power of the court to permit him to do so at any time before the discharge is granted. In *re Houghton*, 10 N. B. R. 337; 2 Lowell, 828; Fed. Cas. 6,730.

## IV. IN GENERAL.

14. An intervenor, having become the purchaser of a claim sued on, may prosecute the suit in his own name. *Morris et al. v. Swartz*, 10 N. B. R. 305.

15. Debtors filed a denial that the proper number and amount of creditors had joined in the petition (act of 1867). No reference was made to ascertain the facts, but an entry of an order for reference appeared on the minutes of the judge. *Held*, that the judge was not called upon to fix a time within which additional creditors might join in the petition. In *re Frisbie et al.*, 15 N. B. R. 523; 14 Blatchf. 185; Fed. Cas. 5,129.

16. The court in which an action is pending against a bankrupt has no authority to compel the assignee to become a party. *Serra e Hijo v. Hoffman & Co.*, 17 N. B. R. 124

## INVENTORY.

See SCHEDULE

## INVOLUNTARY BANKRUPTCY.

See PARTNERSHIP, II, III; PETITIONS.

## JOINDER.

See PLEADING AND PRACTICE, XV, (f).

## JOINT LIABILITY.

See COMMERCIAL PAPER; PARTNERSHIP, XII; SURETY.

## JUDGE.

See COURTS.

A judge who has been a depositor in an insolvent banking institution, but who has sold his claim, is not thereby disqualified from sitting in the matter, although the motive on the part of the purchaser of the claim may have been to remove the disqualification. *In re Sime & Co.*, 7 N. B. R. 407; 2 Sawy. 320; 5 Pac. Law Rep. 217; Fed. Cas. 12,860.

## JUDGMENT.

### I. INJUNCTION OR STAY.

### II. LIEN OF JUDGMENT.

### III. FRAUD.

(a) *In General.*

(b) *Tort.*

### IV. TRUSTEE.

### V. PREFERENCE AND CONFESSION.

### VI. VOID.

(a) *In General.*

(b) *When Not Set Aside.*

### VII. REDEMPTION.

## VIII. DOCKET.

## IX. PARTNERS.

## X. IN GENERAL.

See EXEMPTIONS, 32, 74, 79; INJUNCTIONS, 38, 43; PLEADING AND PRACTICE, 12, 46, 103, 117, 118, 185; SALES, 6; SCHEDULE, 7; STAY OF PROCEEDINGS, 15; SUITS, 8; TRUSTEE, 27, 178.

## I. INJUNCTION OR STAY.

1. A joint judgment against the bankrupt and a third party does not in any way affect the right of the plaintiff to proceed against the third party, even though enjoined from enforcing execution against the bankrupt. *Penny v. Taylor*, 10 N. B. R. 200; Fed. Cas. 10,957.

2. Although a judgment provides that no execution shall issue until the further order of the court, if the judgment was entered after a motion by the bankrupt defendant for a stay of proceedings it was erroneous. *McKay v. Funk*, 18 N. B. R. 334.

3. The defendant may plead in bar his bankruptcy and the proof of the plaintiff's claim; or at any time after the institution of the proceedings may apply to the court in which the action is pending for a stay of proceedings. If he does neither, the judgment rendered against him is valid, and in the absence of fraud is conclusive against him and the surety on his bond to dissolve an attachment. *Cutter et al. v. Evans*, 11 N. B. R. 448.

4. An order being secured to show cause why a judgment should not be revived and become a lien on the realty of the defendant, it was shown that a petition in bankruptcy had been filed by the defendant and an assignee appointed, by whom certain of the realty had been sold, but no discharge in bankruptcy had been made. The plaintiff had not proved his claim. Upon appeal, a stay of proceedings was granted until the discharge in bankruptcy. *Bratton v. Anderson*, 14 N. B. R. 99.

## II. LIEN OF JUDGMENT.

See LIENS, 7, 16, 18, 122; ATTACHMENT, 23, 39; ESTATES, 225; MORTGAGES, 38.

5. A judgment was obtained by a creditor before the beginning of proceedings, and exe-

cution was levied after the defendant was adjudged bankrupt. The levy was on personal property located on the leased premises, and the debtor's landlord notified the sheriff that he claimed the rent due him out of the proceeds of the sale. *Held*, that the landlord was entitled to his lien for rent. *Barnes' Appeal*, 18 N. B. R. 548; 91 U. S. 521.

6. The issuing of execution on a judgment in 1861 does not create a lien that will be enforced by the bankrupt court in 1868. In *re McIntosh*, 2 N. B. R. 158; Fed. Cas. 8,826.

7. Where a levy is made by a sheriff after the filing of a petition in bankruptcy on a judgment rendered before, the assignee must make a sale and hold the proceeds subject to the liens determined by the court. *Pennington, Ass. v. Sole et al.*, 1 N. B. R. 157; Fed. Cas. 10,939.

8. Although creditors have doubts as to the solvency of their debtor at the time of ordering execution, yet the court will protect them in the advantage thus secured. In *re Kerr*, 2 N. B. R. (8 vo. ed.) 388.

9. The fact of a judgment by confession does not invalidate a lien if the creditor did not know of the failing circumstances of the debtor. In *re Weeks*, 4 N. B. R. 116; 2 Biss. 259; Fed. Cas. 17,350.

10. A judgment lien is good against the proceeds of a sale of land in the hands of an assignee, it not being shown that the debtor was insolvent, or that the creditor knew of the insolvency at the time of the levy. *Armstrong v. Rickey et al.*, 2 N. B. R. 150; 1 Chi. Leg. News, 145; Fed. Cas. 546.

11. A lien by judgment does not create any vested right in the property subject to such lien. In *re Jordan*, 8 N. B. R. 180; 5 Leg. Op. 169; Fed. Cas. 7,514.

12. Judgment creditors levied on the debtor's property subject to the lien of an attachment and moved for an order to pay the judgments in full, the debtor having filed his petition in bankruptcy after the levy. The order was refused. In *re Klacke*, 4 N. B. R. (8 vo. ed.) 648.

13. Where a sole creditor obtains judgment which is the only lien on the debtor's real estate, the district court will not entertain a bill to set aside the fraudulent conveyance. In *re Johann*, 4 N. B. R. 143; 2 Biss. 189; Fed. Cas. 7,331.

14. It is optional with the judgment creditor of a bankrupt whether he will prove his debt or rely on his judgment lien. *Heard v. Jones*, 15 N. B. R. 402.

15. A judgment creditor whose mortgage becomes a legal lien upon the interest of the mortgagor in such premises may buy and sell under his judgment, obtain a perfect title to the land, and may then enjoy the same as fully as the judgment debtor might have done had he continued to be the owner. In *re Williams*, 14 N. B. R. 132; Fed. Cas. 17,706.

16. A judgment having been had, execution was levied on certain personalty. Notice was thereafter served that the owner of the personalty had become bankrupt. He was thereafter discharged. The judgment creditor filed a petition for the withdrawal of his proof of claim, in order to condemn property sold by the debtor after judgment but before bankruptcy. It was held that the judgment might be enforced against the last-mentioned property. *Phillips v. Bowdoin*, 14 N. B. R. 43.

17. A judgment which, by the laws of the state in which it was recovered, is not a valid lien, will not be recognized as a lien in proceedings in bankruptcy. In *re Cozart*, 3 N. B. R. 126; Fed. Cas. 3,313.

18. A judgment rendered before adjudication in bankruptcy has priority in payment out of the proceeds of the bankrupt's estate on which it was a lien over the fees and costs of the bankruptcy proceedings, when such proceeds are insufficient for the payment of both. In *re Hambright*, 2 N. B. R. 157; 2 Amer. Law T. Rep. Bankr. 61; 1 Chi. Leg. News, 201; Fed. Cas. 5,973.

19. A creditor asked for a decree *in rem* against a fund upon which he obtained a lien more than four months prior to the commencement of proceedings, notwithstanding his debtor had since been discharged as a bankrupt. *Held*, that he was entitled to such a decree. *Stoddard v. Locke et al.*, 9 N. B. R. 71.

20. A judgment recovered after a general assignment for the benefit of creditors, without preference, creates no lien on the property so assigned, although such assignment be subsequently set aside upon application of an assignee in bankruptcy. *Belden, Ass.*

etc., v. Smith et al., 16 N. B. R. 302; Fed. Cas. 1,242.

21. After a general assignment for the benefit of creditors, without preference, a creditor recovered a judgment against the assignor, and docketed it in the county where debtor's real estate was situated. *Held*, that the judgment was not a cloud upon the title of the land assigned. *Id*.

### III. FRAUD.

#### (a) *In General.*

22. A creditor of a bankrupt, prior to the commencement of proceedings, recovered judgment for goods sold. An order of arrest was granted on affidavits showing that credit given was induced by fraudulent representations. An appeal from this order was not determined until after bankruptcy proceedings had been commenced, when it was affirmed. *Held*, that such a debt is not dischargeable in bankruptcy, and that, as there was judgment before the commencement of bankruptcy proceedings, a stay of proceedings was not authorized by Revised Statutes, section 5106. *In re Pitts*, 19 N. B. R. 63; Fed. Cas. 11,190.

23. A judgment creditor's debt was shown by the record in a state court to be created by fraud. It was not enforced in the bankrupt court. *In re Robinson*, 1 N. B. R. 49; 2 Ben. 145; Fed. Cas. 11,937.

24. A court in bankruptcy will not discharge a judgment based upon fraud of the bankrupt, and will not interfere to prevent imprisonment therefor. *In re Pettis*, 2 N. B. R. 17; Fed. Cas. 11,046.

25. Judgments obtained by creditors acting in fraud of the bankrupt act will be held invalid, and all subsequent proceedings will be set aside as being superseded by the bankruptcy proceedings. *Buchanan et al. v. Smith*, 7 N. B. R. 513; 16 Wall. 277.

26. A judgment debtor's claim was objected to on the ground that the judgment was for a debt procured by fraud on the bankrupt, and had been secured by default. *Held*, that the assignee could not set up such defense. It should have been set up at the trial when judgment was had. *Stillwell v. Walker, Ass. etc.*, 17 N. B. R. 569; 6 Cent. Law J. 406; Fed. Cas. 13,451.

27. Whether a judgment is rendered for fraud is not a question for a jury, but must be determined from an inspection of the record. *Flanagan v. Pearson*, 14 N. B. R. 37.

28. The value of property conveyed to a wife in fraud of creditors cannot be recovered by a judgment *in personam* against the wife. *Phipps et al. v. Sedgwick, Ass. etc.*, 16 N. B. R. 64; 95 U. S. 3.

29. Where the record shows that the foundation for a judgment was fraud, the judgment need not show that fact on its face. *Warner v. Cronkite*, 18 N. B. R. 52; 6 Biss. 453; 1 N. Y. Wkly. Dig. 291; 8 Chi. Leg. News, 17; Fed. Cas. 17,180.

30. The fact that an affidavit was filed and execution issued and levied on the same day that the proceedings in bankruptcy were begun does not show collusion. *Witt, Ass. v. Hereth*, 18 N. B. R. 106; 6 Biss. 474; 8 Chi. Leg. News, 41; 1 N. Y. Wkly. Dig. 436; Fed. Cas. 17,921.

31. Foreign judgments are only *prima facie* evidence of the debt due to the plaintiff, and such a judgment is open to examination, not only to show that the court was without jurisdiction, but that it was fraudulently obtained. Domestic judgments cannot be collaterally impeached if rendered in a court of competent jurisdiction. *Michael's et al. v. Post, Ass.*, 12 N. B. R. 152; 21 Wall. 398.

32. A judgment is no more liable to collateral impeachment under the bankrupt act, except to show that the judgment in question was designed as a means of avoiding the equal distribution of the debtor's estate among his creditors, than it is to such impeachment in the courts where it was rendered. *Id*.

33. A judgment may be impeached to show it was procured to avoid the operation of the bankrupt act, and evidence is admissible to show that it was procured within four months of filing a petition, that the debtor was insolvent, and that the plaintiff had reasonable cause to believe him so. *Id*.

34. A creditor recovered judgment against a bankrupt in the state court. The bankrupt was arrested on the execution, and gave a recognizance to appear for examination under the laws of the state for the relief of poor debtors. He appeared, and the examination was continued from time to time. The bank-

rupt, pending examination, filed his petition in bankruptcy and an assignee was chosen. The creditor afterwards filed charges of fraud against the bankrupt, under the statute of the state. *Held*, that such charges of fraud are not a new suit which should be stayed under the bankrupt act, and that the bankrupt was entitled to a discharge from arrest. *Minon v. Van Nostrand*, 4 N. B. R. 28; 1 Lowell, 458; Fed. Cas. 9,642.

35. In an action on a judgment recovered prior to an adjudication, the plaintiff is entitled to set up a fraudulent concealment by the bankrupt of his property, against his plea of discharge. In *re Perkins et al.*, 3 N. B. R. 189.

#### (b) *Tort.*

36. A judgment entered in an action for a tort after the commencement of the proceedings, upon a verdict rendered before that time, is not a provable debt. Leave to issue execution on the judgment will not be granted. *Black v. McClelland*, 12 N. B. R. 481; 7 Chi. Leg. News, 420; 1 N. Y. Wkly. Dig. 174; Fed. Cas. 1,462.

37. A brought against B. an action in tort for personal injuries. Before the final judgment was perfected a petition in bankruptcy was filed against B. The judgment was perfected before adjudication. *Held*, that such a judgment, if entered before adjudication, may be proved against a bankrupt's estate. In *re Hennocksburg et al.*, 7 N. B. R. 87; 6 Ben. 150; Fed. Cas. 6,367.

#### IV. TRUSTEE.

38. Where an assignee in bankruptcy applied to the court to sell real estate, subject to specified incumbrances, and an order was accordingly made, and after the sale the assignee reported that the property had been sold free of all incumbrances other than those specified, *held*, that the holder of the judgment, which was a lien against the property, and who was not a party to the proceedings, was not debarred from enforcing his lien, as the court confirmed the sale and not the assignee's report. In *re McGilton et al.*, 7 N. B. R. 294; 8 Biss. 144; 29 Leg. Int. 832; 5 Chi. Leg. News, 1; 20 Pittsb. Leg. J. 29; Fed. Cas. 8,798.

39. Where a judgment was a lien on the bankrupt's lands and an assignee was appointed after judgment, on a petition filed also after judgment, the rents of the land go to the assignee and not to a receiver of the court where the judgment was had, who was appointed after the filing of the petition. *Conover v. Dumahaut et al.*, 17 N. B. R. 558.

40. Where a creditor has leave to proceed with a pending cause, pursuant to section 5106, Revised Statutes, a judgment without making the assignee a party is valid. In *re The Bousfield & P. Mfg. Co.*, 17 N. B. R. 153; Fed. Cas. 1,704.

41. The amount collected by a foreign creditor under his execution levied after the adjudication must be accounted for to the assignee, and proof be made and dividend taken upon the original debt without regard to the subsequent judgment. In *re Bugbee*, 9 N. B. R. 258; Fed. Cas. 2,115.

#### V. PREFERENCE AND CONFESSION.

See PREFERENCES, 17, 256, IX, XVI, (e); COMMERCIAL PAPER, 26.

##### (a) *In General.*

42. A creditor who obtains payment of his debt under a judgment, through the non-residence of the debtor, is not liable to repay the money to the assignee. *Henkelman et al. v. Smith, Ass.*, 12 N. B. R. 121.

43. There was a confession of judgment and a levy in November and the bankruptcy of the defendant occurred in January following. *Held*, a preference, and motion to satisfy the judgment out of the proceeds of the sale was denied. In *re Fitch et al.*, 2 N. B. R. 164; Fed. Cas. 4,835.

44. The preference upon a judgment note is not obtained when a warrant of attorney is given, but when judgment is entered. *Golson et al. v. Niehoff*, 5 N. B. R. 56; 2 Biss. 424; Fed. Cas. 5,524.

45. A debt due certain creditors was merged in a judgment which was a fraudulent preference. It was held not provable, and a petition founded upon it cannot be sustained, but the creditors will be allowed to surrender such preferences, when adjudication will be allowed. In *re Hunt et al.*, 5 N. B. R. 433; Fed. Cas. 6,882.

46. When the United States take a judgment they waive the right to prove the debt, and, notwithstanding the discharge of the debtor, this debt is not affected by discharge (act of 1867). *In re Mansfield*, 6 N. B. R. 388; Fed. Cas. 9,049.

47. A judgment may be confessed for money contingently to become due. *Cook v. Waters et al.*, 9 N. B. R. 155.

48. The Code of Procedure makes no change in the then existing laws as to the character of the liability, existing or contingent, for which a judgment might be confessed (act of 1867). *Id.*

49. The confession of a judgment, the issuing of an execution, and a sale of property under it, constitute an indirect transfer of such property by the debtor. *Zahn v. Fry et al.*, 9 N. B. R. 546; 10 Phila. 243; 81 Leg. Int. 197; 21 Pittsb. Leg. J. 155; Fed. Cas. 18,198.

50. A judgment recovered by a creditor in the course of practice of the courts, and without collusion between the creditor and the debtor for the purpose of giving such creditor priority, and the levy under it, are good, even as against an assignee in bankruptcy subsequently appointed. *Dolson et al. v. Kerr, Sheriff*, 16 N. B. R. 405.

## VI. VOID.

### (a) *In General.*

See CLAIMS, 9; PETITION, 161.

51. A judgment, though confessed upon a defective statement, is not absolutely void, but is only so as to creditors who have a lien upon the property sought to be affected by the judgment. *In re Fuller*, 4 N. B. R. 29; 18 Pittsb. Leg. J. 82; 2 Chi. Leg. News, 373; Fed. Cas. 5,148; 1 Sawy. 243.

52. A judgment obtained against an insolvent debtor is not declared void by the act under any circumstances; and, if obtained without fraud or collusion, is as conclusive evidence of the claim and its amount as if given against solvent debtor. *Catlin v. Hoffman*, 9 N. B. R. 342; 2 Sawy. 486; 21 Pittsb. Leg. J. 159; Fed. Cas. 2,521.

53. A judgment is void if the plaintiff knew at the time it was entered up that the debtor had executed an assignment to the plaintiff and another party. *Shaffer v. Fritchery et al.*, 4 N. B. R. 179; Fed. Cas. 12,897.

54. A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void and does not make such judgment usurious. *In re Fuller*, 4 N. B. R. 29; 1 Sawy. 243; 18 Pittsb. Leg. J. 82; 2 Chi. Leg. News, 373; Fed. Cas. 5,148.

55. If proceedings in bankruptcy are commenced within four months after the issuing of an attachment, a judgment entered thereafter is void. *King v. Loudon, Ass.*, 14 N. B. R. 383.

### (b) *When Not Set Aside.*

56. Judgment notes given long before the judgment debtor was adjudged, and just previous to his bankruptcy, to secure loans of money, and given at the times the money was advanced, are valid; and judgments entered upon such notes within a short time before the filing of the petition in bankruptcy will not be set aside. *Piper v. Baldy*, 10 N. B. R. 517; 10 Phila. 247; 81 Leg. Int. 316; 22 Pittsb. Leg. J. 29; Fed. Cas. 11,179.

57. Judgments are not to be set aside as fraudulent and void merely because the plaintiff has exacted a high rate of interest, especially when, at the time of entering the judgments, valuable collateral securities were surrendered to the debtor by the plaintiff for a large part of said judgments. *Shaffer v. Fritchery & Thomas*, 4 N. B. R. 179; Fed. Cas. 12,697.

58. A judgment note given for a valuable consideration more than four months before the commencement of proceedings on which the judgment is entered, and execution is issued within four months of the commencement of proceedings in bankruptcy, is valid. *Sleek et al. v. Turner, Ass.*, 10 N. B. R. 530.

## VII. REDEMPTION.

59. Under the statutes of Alabama the right of redemption is secured to the debtor whose land is sold and to his judgment creditors whose judgments would, but for the sale, operate as a lien on the land, but not to the creditors generally. *Trimble v. Williamson*, 14 N. B. R. 53.

60. Where the right of a creditor and that of a debtor to redeem property, sold under an execution, are distinct under the state law, the bankruptcy of the debtor does not affect the right of the creditor. *Id.*



61. A's property was sold under the mortgage for less than the amount thereof. The property was bid in by the mortgagee, who took judgment for the deficiency. A's assignee in bankruptcy redeemed the property by paying the amount for which it had been bid in with interest. *Held*, that the judgment for the deficiency was not a lien on the property. *Lloyd, Ass. etc., v. Hoo Lue et al.*, 17 N. B. R. 170; 5 Sawy. 74; 1 San Fran. Law J. 392; Fed. Cas. 8,432.

### VIII. DOCKET.

62. In the entry of the docket of a judgment, the amount and date of the judgment, the parties to it, and the court in which it was rendered, appeared. *Held*, a valid entry. *In re Boyd*, 16 N. B. R. 204; 4 Sawy. 262; 9 Chi. Leg. News, 385; 10 Chi. Leg. News, 1; 4 Law & Eq. Rep. 488; 6 Amer. Law Rec. 311; Fed. Cas. 1,746.

63. The record of a judgment disclosed the fact that the judgment creditor was restrained from enforcing it against the separate property of the debtor. *Held*, that the judgment record might be examined to test the validity of the docket entry, although it could not be resorted to to supply omissions in the entry. *Id.*

64. The docketing of a transcript of judgment on a holiday is not void, in the absence of legislation to the contrary, and establishes a lien on the real estate of the debtor in the county where filed. *In re Worthington*, 16 N. B. R. 52; 7 Biss. 455; 1 N. W. Rep. (O. S.) 109; 9 Chi. Leg. News, 346; 4 Law & Eq. Rep. 78; 16 Alb. Law J. 68; 23 Int. Rev. Rec. 283; 2 Cin. Law Bul. 189; Fed. Cas. 18,051.

65. The docketing of a judgment on a day that is declared a holiday by statute is void and confers no lien, for the term "holiday" imports *dies non juridicus*. *Id.*

### IX. PARTNERS.

66. Where a judgment is obtained against partners and others jointly, it is a several claim as against the bankrupts, and is not entitled to a dividend from the joint estate. *In re Herrick*, 13 N. B. R. 812; Fed. Cas. 6,420.

67. G. obtained judgment on notes against K. Bros., and S. K. Bros. were subsequently adjudged bankrupts, and G. proved against

their estate. On motion to expunge, *held*, that the debt could be proved against the estate of the principal debtors, notwithstanding a joint judgment had been recovered therefor against the principal debtors and surety. *In re Kitzinger et al.*, 19 N. B. R. 152; Fed. Cas. 7,861.

68. A judgment recovered by a partnership creditor against the members of a firm operates as a several lien against the real estate of each partner, and if prior to a judgment against an individual partner, of an individual creditor of such partner, is to be preferred to such subsequent judgment. If such partnership creditor can get satisfaction of any part of his judgment out of the partnership assets, the *pro rata* distribution to which he is entitled shall be first applied as a credit on said judgment against the separate partner in relief of the fund of such separate partner for the benefit of the separate creditor. *In re Lewis*, 8 N. B. R. 546; 2 Hughes, 320; 21 Pittsb. Leg. J. 77; Fed. Cas. 8,318.

69. Judgment was recovered on the note of the firm A, B, C. & D. in an action in which D. was not served with process. On the bankruptcy of the firm, *held*, that the judgment could not be paid out of the proceeds of the sale of real estate, the legal title to which was in D. *In re Hinds et al.*, 8 N. B. R. 91; Fed. Cas. 6,516.

70. A member of an insolvent firm, having knowledge of the insolvency, at the request of a creditor holding the firm's judgment note, unwillingly carried a message from the creditor to an attorney, directing him to enter judgment. *Held*, that he had procured entry of judgment. *In re Benton et al.*, 16 N. B. R. 75; 3 Wkly. Notes Cas. 547; Fed. Cas. 1,383.

### X. IN GENERAL.

See CLAIMS, 106, 196, VIII, (b), IX, (i), X, (f); COURTS, 66; DISCHARGE, 309, 330; DIVIDENDS, 34; ESTATES, 183, 190, 191; INSOLVENCY, 43.

71. A judgment taken by confession as collateral for the aggregate of several other valid judgments does not affect their validity. *Vogle v. Lathrop*, 4 N. B. R. 146; 3 Pittsb. Rep. 268; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,935.

72. A judgment upon which an appeal is pending is a final judgment in the contemplation of the bankrupt act. *Merritt v. Glidden et al.*, 5 N. B. R. 157.

73. Unsatisfied judgments against others liable with the bankrupt are not affected by proving a debt against him. *In re Levy*, 1 N. B. R. 66; 2 Ben. 169; Fed. Cas. 8,297.

74. A creditor who obtains judgment for his debt after adjudication, and takes out execution, cannot prove his debt in bankruptcy, and cannot oppose the bankrupt's discharge. *In re Gallison*, 5 N. B. R. 853; 2 Lowell, 72; Fed. Cas. 5,203.

75. A judgment rendered after proceedings in bankruptcy on a provable debt does not prevent the original debt being proved in the proceedings. *In re Rosey*, 8 N. B. R. 509; 6 Ben. 507; Fed. Cas. 12,066.

76. A bankrupt permitted a judgment to be recovered against him, the cause of action on which the same was recovered having arisen prior to his discharge. *Held*, that having waived his discharge the creditor had a right to enforce the judgment against any property of the debtor. *Dewey et al. v. Mayer et al.*, 16 N. B. R. 1.

77. On a note on which the bankrupt was indorser, action was commenced prior to filing the petition, and judgment was recovered after filing the petition but before adjudication. *Held*, that the debt upon which the judgment is founded is merged in the judgment. *In re Crawford*, 3 N. B. R. 171; 3 Amer. Law T. 169; 1 Amer. Law T. Rep. Bankr. 210; Fed. Cas. 3,363.

78. The fact that a claim existed, at the time of giving a mortgage, as a liability and not as a debt, does not change the relation of the party, and a subsequent judgment is neither a payment nor satisfaction of it. *Burtee v. First Nat. Bank*, 9 N. B. R. 314.

79. A judgment recovered in an action in *assumpsit* commenced prior to, and prosecuted during, proceedings in bankruptcy, is a provable debt. *In re Stansfield*, 16 N. B. R. 268; 4 Sawy. 334; Fed. Cas. 13,294.

80. A judgment which is a lien on property sold by the bankrupt before the commencement of the proceedings may be enforced against such property, although it was proved in bankruptcy, if such proof was subsequently withdrawn under a special order of the court. *Phillips v. Bowdoin*, 14 N. B. R. 43.

## JURATS.

See EVIDENCE, 98.

## JURISDICTION.

See APPEAL AND WRIT OF ERROR; COURTS, II.

## JURY TRIALS.

### I. WHEN ALLOWABLE.

#### II. WAIVER.

#### III. INSTRUCTIONS.

#### IV. IN GENERAL.

### I. WHEN ALLOWABLE.

1. When a petition is filed to obtain payment for rent that accrued while the assignee occupied the premises, a jury trial may be allowed. *Buckner v. Jewell & Norton*, 14 N. B. R. 286.

2. Issues of fact arising during the progress of summary proceedings may, by direction of the court, be tried by jury. *Bill, Ass. v. Beckwith*, 2 N. B. R. 82; 1 Chi. Leg. News, 103; Fed. Cas. 1,406.

3. If a discharge in bankruptcy be pleaded, the court cannot dismiss the cause on that ground, but must submit the issue to a jury (act 1867). *Austin v. Markham*, 10 N. B. R. 543.

### II. WAIVER.

4. On the return day of an order to show cause the defendant appeared by attorney, but neither filed an answer or other plea or demanded trial by jury, and a continuance was granted on the request of the defendant. On the day to which the case was continued he entered his motion for leave to file an answer and demanded a trial by jury. *Held*, that he had waived right to demand a jury trial. *In re Sherry*, 8 N. B. R. 142.

### III. INSTRUCTIONS.

See EVIDENCE, XI.

5. Instructions are entitled to a reasonable construction, and if correct, when applied to the facts submitted to the jury, they will be sustained in an appellate court, even though, when standing alone, they would be incomplete in respect of some matter suffi-

ciently explained in the evidence. *Willis v. Carpenter*, 14 N. B. R. 521; *Fed. Cas.* 17,770.

5a. It is not error to direct the attention of the jury to the distinction between "reasonable cause to believe" and "actual belief." *Lawrence, Ass., v. Graves*, 5 N. B. R. 279; *Fed. Cas.* 8,183.

#### IV. IN GENERAL.

6. If the respondent desire to controvert the petition, he should, on the return day of the order to show cause, appear before the court and allege that the facts set forth in the petition are not true, and demand a hearing by the court, or a trial by jury, and the court should make a record of such allegation and demand; but no portion of these proceedings previous to the making of the record by the clerk is required to be in writing, except the demand for a trial by jury (act of 1867). In *re Heydette*, 8 N. B. R. 332; *Fed. Cas.* 6,444.

7. A provision of the bankrupt act of 1867 that, where a trial by jury is demanded, the trial shall be "at the first term of the court at which a jury shall be in attendance," does not prevent the court from ordering a special jury when the circumstances of the case require a trial sooner than when a jury would be in attendance in the course of regular terms of the court. In *re Hawkeye Smelting Co.*, 8 N. B. R. 385.

8. Where a creditor, opposing the discharge of a bankrupt, files specifications of his opposition in writing, the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the district court, and the better opinion is that the trial should be by jury. *Morgan v. Thornhill*, 5 N. B. R. 1; 11 Wall. 65.

#### LACHES.

##### I. CREDITOR. II. BANKRUPT.

See EXEMPTIONS, 24; FRAUD, 4; PLEADING AND PRACTICE, 5, 108, 308.

##### I. CREDITOR.

See CORPORATIONS, 16; ESTOPPEL, 16.

1. A creditor received money to vote for a composition. The attorney for other creditors was suspicious at the time, but made

no effort to investigate. The bankrupt contracted new obligations on the faith of the composition. A petition was filed two years after the final order in composition to set it aside. *Held*, that the doctrine of laches applies and petition was dismissed. In *re Herman et al.*, 17 N. B. R. 440; 9 Beav. 436; *Fed. Cas.* 6,405.

2. Where two years has elapsed since a composition was effected and new liabilities have been created, the composition will not be set aside because it was procured by fraud. *Id.*

3. Where the creditor has been guilty of laches in filing a motion to set aside a discharge, the motion will be denied. In *re Buchstein*, 17 N. B. R. 1; 9 Ben. 215; *Fed. Cas.* 2,076.

4. Where one, induced by false representations, takes stock in a corporation, giving therefor his promissory note secured by a deed of trust on real estate, and two years afterwards said corporation becomes bankrupt, during which time he made no examination of the financial condition of said corporation, it is too late to allow fraud to be pleaded, as against creditors, to avoid the obligation of the note. *Farrar v. Walker, Ass.*, 13 N. B. R. 82; 3 Dill 506, note; 1 N. Y. Wkly. Dig. 229; 2 Cent. Law J. 670; *Fed. Cas.* 4,679.

5. A stockholder of a corporation will not be heard after the lapse of nearly a year to impeach the correctness of an adjudication in bankruptcy, he knowing all the time all the facts in the case and of the proceedings in bankruptcy. In *re Baltimore Co. Dairy Ass'n*, 11 N. B. R. 253; 2 Hughes, 250; 2 Md. Law Rep. 297; *Fed. Cas.* 828.

6. The specifications filed in opposition to discharge being held irregular, ten days were allowed in which to amend. When presented amended, the creditors asked for an order for an examination of the bankrupt. Abundant time had been accorded for the examination in regular course, but none was made. No showing by affidavit was made to support the request for an examination, and the request was denied. In *re Isidor and Blumenthal*, 1 N. B. R. 83; 2 Ben. 123; *Fed. Cas.* 7,105.

##### II. BANKRUPT.

See DISCHARGE, 65, 70, 334, 335.

7. C., who joined in a voluntary petition with his partners and actually assisted in the proceedings, moved five months after the ad-

judication to set it aside on the ground of the fraud of his partners in inducing him to join. *Held*, that though there is a possibility that he might establish the fraud, yet he has been guilty of such laches as to deny him the right. *In re Court et al.*, 17 N. B. R. 555; Fed. Cas. 8,284.

8. A bankrupt court has no power to grant relief against a judgment recovered against a bankrupt in an action on a debt contracted before the adjudication, in which, for any cause, his discharge has not been pleaded. If the court had power to grant relief in such a case, it would not interfere to save him from the result of the laches of his counsel and himself. *In re Ferguson*, 16 N. B. R. 530; 2 Hughes, 286; Fed. Cas. 4,738.

9. A bankrupt delayed in obtaining the requisite number of signatures to a composition. *Held*, that such delay, unaccompanied by laches, would not justify a refusal to record the resolution. *In re Cavan et al.*, 19 N. B. R. 303; Fed. Cas. 2,528.

## LANDLORD AND TENANT.

See LEASE; RENT.

## LAW OF PLACE.

See PLACE OF RESIDENCE.

## LEASE.

### I. ASSIGNEE.

### II. COVENANTS.

### III. IN GENERAL.

See RENT, 14.

### I. ASSIGNEE.

See ESTATES, 97, 98, 168.

1. An assignee who knows nothing of the existence of a lease of the bankrupt is not bound by its covenants. There must be some positive act of acceptance of said lease before the assignee can be held liable. *In re Washburn*, 11 N. B. R. 66; Fed. Cas. 17,211.

2. Unless it will benefit the creditors, an assignee is not bound to take a leasehold es-

tate belonging to the bankrupt. *White v. Griffing*, 18 N. B. R. 399.

3. A lease executed by the bankrupt prior to the bankruptcy and not recorded, and which is free from fraud as to the creditors, is valid as against the assignee though he had no notice of it. *Goss v. Goffin*, 17 N. B. R. 332.

4. A. made a lease for a term of years of a hotel owned by him and assigned the lease to a creditor to secure a debt due him. Afterward A. became bankrupt. *Held*, that the assignee in bankruptcy must take the estate subject to the lease, and that the law will recognize the assignment and protect the creditor as to his rights in the leased property. *Meador et al. v. Everett, Ass.*, 10 N. B. R. 421; 8 Dill 214; 1 Cent. Law J. 453; Fed. Cas. 2,876.

## II. COVENANTS.

5. A covenant in a lease for a lien, intended to operate as a mortgage, is of no force unless the property is reduced to possession under the power to take possession and sell, or unless the lease is recorded, by the Michigan laws. *In re Dyke et al.*, 9 N. B. R. 430; Fed. Cas. 4,227.

6. Where premises under a lease are condemned to the use of a railroad company, and damages are paid by the company to the tenant upon the basis that his obligation to pay rent during the remainder of the term will continue, which obligation he expressly recognizes when he receives the money, and which he partly performs, the landlord, on the bankruptcy of the tenant, will be allowed to prove, as a claim against the estate, the amount of the unpaid instalments of rent, at their value at the time of bankruptcy. *In re Clancy*, 10 N. B. R. 215; Fed. Cas. 2,782.

7. Bankrupts were lessees of a building under a lease which permitted them to make such alterations as were requisite to their business, "subject to clause here following," which provided for the surrender of the building in as good condition as reasonable use would permit. *Held*, that if the alterations injured the building it should be restored to its former condition. *In re Jewell et al.*, 19 N. B. R. 388; Fed. Cas. 7,302.

8. A lease which cannot be assigned with-

out the consent of the landlord is canceled by the bankruptcy of the tenant. In re Breck et al., 12 N. B. R. 215; 8 Ben. 93; Fed. Cas. 1,822.

### III. IN GENERAL.

9. Where a lease is terminated by condition broken, after the filing of a petition and before the appointment of an assignee, the property is in the custody of the court; and a re-entry by the lessor or other interference is in contempt of its authority. In re Steadman, 8 N. B. R. 819; Fed. Cas. 13,880.

10. The bankrupt act makes no provision for a preference in favor of a landlord; but, in its administration, it is the court's duty to recognize and enforce any lien he may have by virtue of the state law. In re McConnell, 9 N. B. R. 887; 10 Phila. 287; 81 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

### LEVY.

See EXECUTION.

### LIENS.

#### I. EXECUTION.

#### II. LEVY.

#### III. RELEASED.

(a) *Generally.*

(b) *Set Aside.*

#### IV. OPPOSITION OF TRUSTEE THERETO.

#### V. FOR RENT.

#### VI. EQUITABLE LIENS.

#### VII. UPON PARTNERSHIP PROPERTY.

#### VIII. EXEMPTIONS.

#### IX. SALES.

#### X. MECHANICS'.

(a) *Generally.*

(b) *Maritime.*

#### XI. SECURED.

#### XII. IN GENERAL.

See EXECUTION, 14, 15; JUDGMENT, 17, 19, 51, II; PLEADING AND PRACTICE, 96; REFERENCES, 42, 71, 225, 238, 243, 261, IX, XIII, XV; PROOF OF CLAIMS, 87.

### I. EXECUTION.

See COURTS, II, (b), 8.

1. Prior to the beginning of proceedings an execution was placed in the marshal's

hands. *Held*, that the execution creditor's lien was not affected by the proceedings in bankruptcy. In re Wheeler et al., 18 N. B. R. 385; 26 Pittsb. Leg. J. 84; Fed. Cas. 17,490.

2. Execution may be stayed to give the parties an opportunity to apply to the district court, where an assignee appears in an action in a state court, brought to enforce a lien against the bankrupt. *Rowe v. Page*, 18 N. B. R. 866.

3. Executions issued against a debtor when the creditor had not reasonable cause to believe that the debtor was insolvent are valid. In re Black et al., 2 N. B. R. 65; Fed. Cas. 1,458.

4. Execution was issued before the commencement of proceedings in bankruptcy. By the local law an execution was a lien upon personal property from the time it reached the sheriff's hands. *Held*, that the judgment creditor's lien was paramount and controlled the fund as against general creditors. *Wilson v. Childs*, *Anshutz v. Campbell*, and *In re Weamer*, 8 N. B. R. 527; 10 Phila. 275; 6 Chi. Leg. News, 27; 21 Pittsb. Leg. J. 17; Fed. Cas. 17,796.

5. Where goods taken under an execution have been relinquished before filing a petition in bankruptcy, no lien is created in favor of the judgment creditor. *Sage, Jr., v. Wynkoop, Ass.*, 16 N. B. R. 363; Fed. Cas. 12,215.

6. The sheriff had custody of the goods of the bankrupt by virtue of an attachment. Other creditors obtained judgment and issued execution. *Held*, that the subsequent executions created a lien on the goods in the sheriff's hands not covered by the attachment. In re Nelson, 16 N. B. R. 312; 9 Ben. 238; Fed. Cas. 10,100.

7. After an execution had been placed in the sheriff's hands, but before levy was made, a bankrupt filed his petition in bankruptcy. *Held*, that the judgment creditor had a lien on the debtor's property. *Bartlett, Ass., v. Russell*, 16 N. B. R. 211; 4 Dill. 267; 9 Chi. Leg. News, 377; 6 Amer. Law Rec. 18; 4 Law & Eq. Rep. 497; 24 Pittsb. Leg. J. 206; Fed. Cas. 1,080.

8. Mortgagees took possession of property under the mortgage. A creditor of the mortgagor issued execution to the sheriff. One hour later and before the sale under the mortgage, the mortgagor filed his petition in

bankruptcy. *Held*, that the execution creditor had no lien on the proceeds, even if there was a surplus after satisfying the mortgage. *In re Wrisley et al.*, 17 N. B. R. 259; Fed. Cas. 18,103.

9. A lien obtained through a judgment is not affected by bankruptcy proceedings afterwards commenced, although an appeal was taken, if no bonds were executed by the appellant. *In re Gold Mountain M. Co.*, 15 N. B. R. 601; Fed. Cas. 5,515.

10. After the goods of a debtor had been taken under attachment by the sheriff, certain creditors secured a judgment and execution was issued to the sheriff, who made no levy of it, as he was in possession. Within an hour after the execution issued, a petition in bankruptcy was filed. *Held*, that the execution creditors obtained a lien and were entitled to priority. *In re Hull*, 18 N. B. R. 1; 14 Blatchf. 257; Fed. Cas. 6,857.

11. Where a judgment is recovered in an attachment suit and process is issued for sale of the property, the lien relates back to the attachment. *Hudson, Ass., v. Adams*, 18 N. B. R. 102; 3 Cin. Law Bul. 1066; Fed. Cas. 6,832.

12. The creditors of bankrupts delivered an execution to the sheriff before the petition in bankruptcy was filed. The assignee took possession of the estate before the return day of the execution, and the creditors proved their claim as secured by a lien through the delivery of the execution to the sheriff. *Held*, that an actual levy was not essential to the existence of the creditors' lien, and that they had a lien when the claim was proved, which the court will enforce. *In re Stockwell et al.*, 18 N. B. R. 144; 9 Ben. 265; Fed. Cas. 13,464.

13. The plaintiffs recovered judgment in an action against the bankrupt and his trustee, and execution issued; the sheriff demanded the property and afterwards returned the execution *nulla bona*. The bankrupt filed a petition between the demand and return, and an adjudication was made. An action was brought to enforce the trustee's liability for not turning the property over to the sheriff. *Held*, that debtor's bankruptcy did not dissolve the lien on his property in the trustee's possession. *Storer et al. v. Haynes*, 18 N. B. R. 354.

## II. LEVY.

See ESTATES, 153.

14. A sheriff, into whose hands an execution had been placed, obtained a description of the debtor's land, and made his levy by indorsing the levy and a description of the land on the back of the execution. *Held* that, as the state courts would recognize such a levy as valid and as a subsisting lien, it will be so treated by the bankruptcy court. *Armstrong, Ass., v. Rickey*, 2 N. B. R. 150; 1 Chi. Leg. News, 145; 2 Amer. Law T. Rep. Bankr. 65; Fed. Cas. 546.

15. Whatever is treated as a valid levy and a valid lien by the state laws and courts will be so treated by the bankruptcy court. *Id.*

16. Any rights which a judgment creditor has acquired in the personal property of a bankrupt, by reason of levy made prior to the filing of the petition, cannot be destroyed by subsequent proceedings in bankruptcy. *In re Wilbur*, 3 N. B. R. 71; 1 Ben. 527; 2 Amer. Law T. Rep. Bankr. 171; Fed. Cas. 17,633.

17. In North Carolina a judgment was not a lien until levy was made on the property of the bankrupt, and would not be enforced by an order for payment out of funds in the hands of the assignee. *In re McIntosh*, 2 N. B. R. 153; Fed. Cas. 8,826.

18. A creditor recovered a judgment against his debtor, but never caused execution to issue. Subsequently, and prior to proceedings in bankruptcy, another creditor recovered judgment and caused execution to issue and levy to be made. The property was sold by the assignee free from incumbrances. *Held*, that the senior judgment creditor was not entitled to any of the proceeds. *In re Mebane*, 3 N. B. R. 91; Fed. Cas. 9,830.

19. T., who had filed a voluntary petition in the eastern district of New York, filed a petition in the southern district of New York to restrain the sale of certain property of the bankrupt on which the sheriff had made a levy. *Held*, that after the filing of the petition the creditor could not acquire a lien by attachment, judgment and levy, and this was not affected by composition proceedings. *In re Tift*, 19 N. B. R. 201; Fed. Cas. 14,034.

20. S. made a general assignment and the assignee took possession the same day. On the following day R. obtained judgment against S., upon which execution was issued and levied upon goods in the possession of the assignee. Subsequently S. was adjudged bankrupt, and the assignee took possession of the property levied on, without prejudice to R.'s rights. *Held* that, the assignment being good, R. acquired no priority of right by the execution levy. *Reed v. McIntyre, Ass. etc.*, 19 N. B. R. 45; 98 U. S. 507.

21. A judgment creditor who levies upon personalty, and subsequently abandons his levy by permitting the property to go back to the defendant, may enforce his lien against land sold by the bankrupt before the proceedings in bankruptcy, and need not follow the personalty into the hands of the assignee. *Winship v. Phillips*, 14 N. B. R. 50.

22. Where several judgments are recovered, liens of each attach in the order of priority. On personalty priority of lien depends on time of levy. *Johnson, Ass. v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

23. Section 5044, Revised Statutes, does not dissolve a lien created by the seizure of a debtor's property on execution issued to enforce a judgment. *Storer et al. v. Haynes*, 18 N. B. R. 354.

### III. RELEASED.

#### (a) *Generally.*

See COMPOSITION, 69.

24. A creditor having a lien on the property of a third party proved his claim in bankruptcy without mentioning his lien and received a dividend. On a suit for the balance due him it was held that the lien was not released. *Bassett et al. v. Baird*, 17 N. B. R. 177.

25. A mortgagee of chattels loses his lien if he does not have it acknowledged and recorded as required by state law. *Harvey v. Crane*, 5 N. B. R. 218; 2 Biss. 496; 3 Chi. Leg. News, 341; Fed. Cas. 6,178.

26. A fund having been recovered by virtue of creditors' rights generally, it must be distributed among them generally, and not

given to one who has lain by and only asserted his special rights after recovery. *White v. Jones, Ass.*, 6 N. B. R. 175; 29 Leg. Int. 325; Fed. Cas. 17,550.

27. Under Michigan statutes an attaching creditor acquires a lien on property attached for debt and costs, but there is no provision for the retention of a lien if the attachment is dissolved, either in the state statutes or in the bankrupt act. In *re Ward*, 9 N. B. R. 349; Fed. Cas. 17,145.

28. H. borrowed a cornet which he had given as security for rent, and kept it until he went into bankruptcy. *Held*, that the security for rent was lost, and that the transaction was a pledge. In *re Harlow*, 10 N. B. R. 280; Fed. Cas. 6,070.

29. The county court disallowed \$876 of the final account of S., a bankrupt, administrator of one McQ., and ordered said amount to be distributed among the heirs. M., attorney for the heirs, gave notice of a lien on the decree for fees. On special agreement as to fees attorney had no lien. In *re Scoggin*, 19 N. B. R. 197; 5 Sawy. 549; 8 Reporter, 330; 11 Chi. Leg. News, 367; Fed. Cas. 12,511.

30. Where a creditor neither proved a claim nor released his lien the security was preserved notwithstanding the debtor's bankruptcy. *Long v. Bullard*, 117 U. S. 617.

31. A lien on real estate is not waived by receiving a chattel mortgage from the debtor. In *re Hutto*, 3 N. B. R. 191; 8 Amer. Law T. Rep. Bankr. 197; 1 Amer. Law T. Rep. Bankr. 226; Fed. Cas. 6,900.

32. A banker has no lien upon a depositor's money for any debt that the depositor may be owing him; hence money on deposit in the name of the bankrupt must go to the assignee, and the banker may file his claim and take his dividends like others. In *re Warner et al.*, 5 N. B. R. 414; Fed. Cas. 17,177.

33. Under the Michigan statutes, a lien is acquired by an attaching creditor upon the property attached for his debt and costs; but those statutes make no provision for the retention of any lien for either in case his attachment is dissolved, neither in favor of the plaintiff nor the officer who makes the levy, and no such provision is found in the bankrupt law. In *re Ward*, 9 N. B. R. 349; Fed. Cas. 17,145.

(b) *Set Aside.*

See *BANKS*, 14, 17; *COSTS AND FEES*, 14.

34. So long as the property remains in the receiptor's hands or the hands of the debtor, the delivery of attached property to the receiptor does not divest the attachment lien. *Rowe v. Page*, 13 N. B. R. 366.

35. In a state whose statute provides that the lien of an attachment expires thirty days from the rendition of judgment, the defendant in an attachment suit made default and an entry of "judgment nisi" was made in the absence of the plaintiff's counsel. At the next term the case was brought forward and judgment was rendered for the plaintiff. *Held*, that the lien of the attachment was not lost by the entry of the "judgment nisi." *Id.*

36. The fact that a judgment was entered upon a warrant of attorney does not invalidate the lien if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy." *In re Weeks*, 4 N. B. R. 116; 2 Biss. 259; Fed. Cas. 17,350.

37. An agreement between the parties to a suit against the bankrupt, to transfer certain claims to such action, so as to shelter them under the lien of an attachment issued therein, is in fraud of the bankrupt act. *Samson v. Burton*, 4 N. B. R. 1; 5 Ben. 343; Fed. Cas. 12,285.

38. A mortgagee brought an action to enforce his lien after the mortgagor had been discharged. The debt was not proved in bankruptcy. *Held*, that the lien was not lost, but might be enforced. *Ass. of Wicks & Co. v. Perkins*, 13 N. B. R. 280; 1 Woods, 383; Fed. Cas. 17,615.

39. A sale of incumbered land, by an assignee, subject to the incumbrance, does not divest the lien of the incumbrance. *Id.*

40. An agistor kept cattle of the bankrupt for pasturing for some time after the proceedings in bankruptcy and delivered them to the assignee, without claiming a lien for the pasturage, who sold them at public auction. *Held*, that the agistor's lien under a state statute was lost. *In re Mitchell*, 8 N. B. R. 47; 5 Chi. Leg. News, 271; Fed. Cas. 9,657.

41. Having attached goods of the debtor a creditor obtained judgment and secured an

order of sale. Afterward a petition in bankruptcy was filed and the debtor was adjudicated a bankrupt. *Held*, that the judgment lien was not invalidated by the proceedings in bankruptcy, even though no execution or order of sale had issued. *Shelley et al. v. Elliston, Ass.*, 18 N. B. R. 375; 26 Pittsh. Leg. J. 92; Fed. Cas. 12,750.

## IV. OPPOSITION OF TRUSTEE THERETO.

See *TRUSTEE*, 166; *ESTATES*, 123; *MORTGAGES*, 108.

42. The petition of the assignees to have the levy of an execution on personal property declared void will be granted where it appears that such levy is not in conformity with the laws of the state in which the same is made. *Beers v. Place et al.*, 4 N. B. R. 150; 36 Conn. 578; 4 Amer. Law T. 136; 1 Amer. Law T. Rep. Bankr. 262; Fed. Cas. 1,233.

43. Where an attachment is dissolved by proceedings in bankruptcy, the title of property attached vests in the assignee subject to all subsisting liens. Where the proceedings of sheriff are regular he has a lien on the property for his fees. *In re Housberger*, 2 N. B. R. 33; 2 Ben. 504; Fed. Cas. 6,734.

44. One lien creditor may take an appeal without other lien creditors being parties. *Milner, Jr. v. Meek, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

45. The bankrupt act does not discourage diligence, and creditors who have obtained a lien by a legitimate effort to collect a debt must be permitted to enjoy the advantages gained by their diligence. *Trimble v. Williamson*, 14 N. B. R. 53.

46. The assignee sold the bankrupt's real estate discharged of liens. A judgment in favor of K. was a lien upon the property at the time the order was made, but its lien expired the day before the sale. *Held*, that it should be allowed its proper portion of the fund. *Davis v. Assignee, etc.*, 19 N. B. R. 61; 7 Reporter, 484; 36 Leg. Int. 176; 26 Pittsh. Leg. J. 115; Fed. Cas. 3,654.

47. The assignee is entitled to the surplus proceeds of a sheriff's sale of the bankrupt's real estate as against a judgment creditor who has waived his lien and proved his claim. *Wallace v. Conrad*, 3 N. B. R. 10.

48. After the filing of a petition no valid



lien can be acquired upon the property of the bankrupt by proceedings in the state court; and an assignee is not bound to go into a state court to defend such a suit. *Stuart v. Hines*, 6 N. B. R. 418.

49. Where liens have been perfected before the commencement of the proceedings in bankruptcy they become effective as against the assignee. In *re Smith et al.*, 1 N. B. R. 169; 2 Ben. 482; 1 Amer. Law T. Rep. Bankr. 112; Fed. Cas. 12,973.

50. An execution creditor was sought to be restrained in the circuit court, and during the proceedings the adjudication was made. The property levied upon was delivered by the sheriff to the assignee subject to such lien as might be sustainable. It was held that the execution creditors might proceed in the district court upon their asserted right of priority, or they might require the assignee to proceed to sustain his asserted right. In *re Hafer et al.*, 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 184; Fed. Cas. 5,897.

51. An assignee may apply to have a lien liquidated, or for an order directing the sale of the property held as security for any debt provable under the bankruptcy, as the most correct means of ascertaining its value, and may from the proceeds pay to the creditor the amount of his debt covered by the security. In *re Stewart*, 1 N. B. R. 42; 1 Amer. Law T. Rep. Bankr. 16; 15 Pittsb. Leg. J. 222; Fed. Cas. 13,418.

52. A creditor obtained judgment for a debt not yet payable, and thereby obtained a lien by levy on the goods of the debtor. *Held*, the lien was invalid against the assignee of the debtor, though the circumstances do not prove a statute preference. *Partridge v. Dearborn et al.*, 9 N. B. R. 474; 2 Lowell, 286; Fed. Cas. 10,785.

53. When, under the state law, a creditor acquires a lien on property upon docketing a judgment, if the docket is ambiguous, no lien arises in favor of the judgment creditor as against the assignee in bankruptcy. In *re Boyd*, 16 N. B. R. 137; 4 Sawy. 262; 9 Chi. Leg. News, 385; 10 Chi. Leg. News, 1; 4 Law & Eq. Rep. 488; 6 Amer. Law Rec. 311; Fed. Cas. 1,746.

54. Two firms had contracts with B. to handle logs, and their employees not receiving pay, they filed their petitions for liens

within the statutory period. B. filed his petition in bankruptcy before one lien was filed and after the other; but no suit was commenced for the enforcement of the liens, and the assignee of the bankrupt contested the validity of the liens. They were held void. In *re Brunquest*, 14 N. B. R. 529; 7 Biss. 208; Fed. Cas. 2,055.

55. An assignee in bankruptcy who gets possession of goods subsequent to the delivery to the sheriff of an execution holds the goods subject to the lien of the execution, even where there has been no actual levy. In *re Paine*, 17 N. B. R. 37; 9 Ben. 144; Fed. Cas. 10,873.

56. Debtors made a fraudulent assignment while solvent to delay their creditors. This was done with the assent of several creditors, but others obtained judgments. *Held*, that such judgments were liens on real estate against an assignee in bankruptcy, and may be enforced by execution on personalty, where acquired prior to proceedings in bankruptcy. *Johnson, Ass. v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

57. Until a receiver is appointed the lien is not so far fixed as to authorize it to be upheld, as against chattels subject to levy on execution as against the assignee in bankruptcy. *Id.*

58. An execution placed in the hands of a constable before, but on which no levy is made until after, the sheriff makes a levy under another execution, creates a lien valid against the assignee if made before proceedings in bankruptcy; but such lien is subordinate to the lien of the sheriff's execution, as the lien of the execution is binding only from the date of levy. In *re Hughes*, 11 N. B. R. 452; 7 Chi. Leg. News, 162; Fed. Cas. 6,843.

59. Unless it be for the benefit of the estate to discharge a mortgage and retain the property, or to sell the property subject to the mortgage, so as by the one or the other method to realize a net sum of money free from the mortgage, it is unnecessary for the assignee to take any proceedings in regard to the mortgaged property of the bankrupt. In *re Lambert*, 2 N. B. R. 188; 1 Chi. Leg. News, 210; Fed. Cas. 8,026.

60. An assignee in bankruptcy must recognize, as preferred claims, all valid liens

against the bankrupt's estate. *Gardner v. Cook, Ass.*, 7 N. B. R. 346; Fed. Cas. 5,226.

61. Any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed or assignee appointed will be void as against the general creditors represented by the assignee. *In re Wynne*, 4 N. B. R. 5; *Chase*, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

## V. FOR RENT.

See RENT, 19, 20, 21; CLAIMS, 98.

62. A landlord does not acquire any lien, by the laws of Alabama, for rent on the goods of a bankrupt found on the demised premises. *Bailey, Ass. v. Loeb*, 11 N. B. R. 271; 2 Woods, 578; 2 Cent. Law J. 42; Fed. Cas. 739.

63. Where the assignee receives rents of mortgaged property it must be distributed among the general creditors. If the mortgagee desires to have it applied specifically to his lien, he must show the insufficiency of his security without rent, and must also intercept it before it reaches the assignee. *Foster v. Rhodes*, 10 N. B. R. 523; Fed. Cas. 4,981.

64. When sufficient goods remain on the premises occupied by the bankrupt to satisfy the rent on distress, the assignee should pay the full amount due up to the time of his surrender to the landlord. *Longstreth v. Pennoth et al.*, 7 N. B. R. 449; 9 Phila. 394; 30 Leg. Int. 29; 20 Pittsb. Leg. J. 107; Fed. Cas. 8,488.

65. A promise by a tenant to deliver a certain quantity of produce in payment of rent and for property purchased of the landlord, without specifying that it is grown upon the premises, does not create a lien in favor of the landlord on an equal quantity of such produce grown on said premises. *Brock v. Terrill*, 2 N. B. R. 190; 1 Chi. Leg. News, 349; Fed. Cas. 1,914.

66. A landlord has a lien in South Carolina on the personal property of the tenant, which is good for one year as against execution and other creditors. *In re Trim*, 5 N. B. R. 23; 2 Hughes, 855; Fed. Cas. 14,174.

67. An assignee in bankruptcy is bound to respect the landlord's lien for rent. *Id.*

68. The owner filed a petition to have paid to him, as a preference, money claimed to be due for rent of a plantation to the bank-

rupts. The personal property of the bankrupts had been sold by the assignee and the funds were in his hands. *Held*, that as the lessor had not secured his lien for rent he should share *pro rata*. *Austin v. O'Rielly*, 8 N. B. R. 129; Fed. Cas. 664.

## VI. EQUITABLE LIENS.

See CONTRACTS, 81.

69. Where a debtor while insolvent purchased property in his wife's name, decrees enrolled against him are not liens upon the property; but a court of equity will pursue for the benefit of creditors the means so invested, and the lien attaches on filing the bill. *Winters et al. v. Claitor et al.*, 18 N. B. R. 538.

70. After the debtor is declared a bankrupt, a creditor cannot obtain an equitable lien on the property of his debtor by a suit. *Id.*

71. The vendor's equitable lien upon land is not discharged by a subsequent mortgage upon the same land, and takes precedence over a judgment lien taken subsequently. *In re Bryan*, 3 N. B. R. 28; Fed. Cas. 2,062.

72. A corporation gave a deed of trust in which it agreed to keep the premises insured, etc., and to make the policies payable to the trustees and deliver such policies to them. After a year the insurance, though effected, was not made payable to the trustees nor were the policies delivered. The buildings burned and the corporation became bankrupt, whereupon the assignee collected the insurance and was about to distribute it to the creditors. The trustee claimed that the covenant gave him an equitable lien upon the proceeds, although the policies were not payable as agreed, etc. *Held*, that the trustee had a good equitable lien. *In re Sands Ale Brewing Co.*, 6 N. B. R. 101; 3 Biss. 175; 4 Chi. Leg. News, 137; 6 Amer. Law Rev. 574; Fed. Cas. 12,307.

73. The commencement of an action in the nature of a creditor's bill gives to the creditor an equitable lien upon the property and choses in action of the debtor, whether in his hands or in the hands of a fraudulent transferee. *Stewart v. Isidor et al.*, 1 N. B. R. 129.

74. The assignee of a note executed for the purchase price of land is not entitled to the security of the vendor's lien thereon,

such lien being personal and not assignable. *In re Brooks*, 2 N. B. R. 149; 2 Amer. Law T. Rep. Bankr. 66; Fed. Cas. 1,943.

75. Whenever the parties by their contract intend to create a lien, either upon real or personal property, whether then owned by the contractor or not, or, if personal property, whether it is *in esse* or not, it attaches in equity as a lien upon the particular property as soon as the contractor acquires a title thereto against the latter and against all persons asserting a claim under him, either with notice or in bankruptcy. *Barnard et al., Ass., v. N. & W. R. R. Co. et al.*, 14 N. B. R. 469; 4 Cliff. 351; 3 Cent. Law J. 608; 5 Amer. Law Rec. 361; 22 Int. Rev. Rec. 312; Fed. Cas. 1,007.

76. Where action is brought to reach choses in action, or property not subject to sale on execution, the weight of authority holds that a lien is acquired by the commencement of the action. *Johnson, Ass., v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

77. A bankrupt sold bonds owned by his sister, and took up a mortgage note with the proceeds and used the balance. He was indebted to his sister, and he held other bonds owned by her. These bonds he pledged. Money was paid to her by him during six years following, and this was charged against the interest on the bonds. *Held*, that the sister was entitled to a lien equivalent to a mortgage lien and to a decree of foreclosure. *Dewey v. Kelton, Ass.*, 18 N. B. R. 217; Fed. Cas. 3,850.

## VII. UPON PARTNERSHIP PROPERTY.

78. The firm of A. & B. was insolvent. On the advice of D., a creditor, and on his promise to give time, A. sold to B. all his interest. D. immediately took judgment and levied on the firm assets in B.'s possession. E., another creditor, also levied on the goods after the adjudication of B. in bankruptcy. *Held*, that E.'s lien was not valid except in case the dissolution of the partnership was fraudulent, so that the goods still remained firm assets. *Russell, Ass. etc., v. McCord, Ass. etc.*, 17 N. B. R. 508; 2 Flip. 139; 3 Cin. Law Bul. 594; Fed. Cas. 12,157.

79. Where an execution lien has been obtained before bankruptcy on the individual

property of a member of a firm, under a judgment against the firm, such statutory lien will not yield to the equities of the creditors of that partner. *In re Sandusky*, 17 N. B. R. 452; 10 Chi. Leg. News, 204; Fed. Cas. 12,308.

80. A. and B. bought real estate with the funds of their business, which consisted in buying and selling real estate. B. became bankrupt, at which time there were partnership debts for which A. was jointly liable. *Held*, that A. had a lien on the real estate until the firm debts were paid, to secure him in case he was compelled to pay them. *Thrall v. Crampton, Ass. etc.*, 16 N. B. R. 261; 9 Ben. 218; Fed. Cas. 14,008.

## VIII. EXEMPTIONS.

### See EXEMPTIONS, VI.

81. A. had a lien on the lands of B. B. was discharged in bankruptcy, and a certain seventy acres of his land was set apart to him under the homestead law. A. did not prove his claim in the bankruptcy proceedings. *Held*, the lien was not released. *Darsey v. Mumpford*, 17 N. B. R. 181.

82. A creditor whose lien overrides the exemption of the state law may enforce such lien without asserting his rights on the hearing of the debtor's application in bankruptcy. *Bush v. Lester et al.*, 15 N. B. R. 36.

83. Where the state law provides that a judgment is a lien from its date upon the property of the defendant, a judgment creditor has the right to enforce this lien against exempt property of a bankrupt, if he did not prove his claim in the bankrupt court. *Id.*

84. The designation, by the assignee, of exempted articles does not divest them of a lien thereon, nor is he obliged to designate articles on which there is no lien. *In re Preston*, 6 N. B. R. 545; Fed. Cas. 11,394.

85. Land which has been set apart by the assignee as exempt and against which there is a vendor's lien will be sold for the satisfaction thereof. *In re Perdue*, 2 N. B. R. 67; 2 West. Jur. 279; Fed. Cas. 10,975.

## IX. SALES.

See SALES, 24; COURTS, 92; II, (b), 2; ESTATES, 35; ESTOPPEL, 22.

86. A sale under a deed of trust, with a power of sale executed by a debtor after-

wards adjudicated a bankrupt, to be valid must be by permission of the court after the creditor therein secured has proved his debt in the bankruptcy proceedings. In re Davis, Ass., et al., 2 N. B. R. 125; 2 Amer. Law T. Rep. Bankr. 52; 1 Chi. Leg. News, 171; Fed. Cas. 3,618.

87. In a sale of real estate discharged of liens, interest on such liens should be allowed to the date of the report of distribution. In re Devore, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

88. Liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property. Cook et al. v. Tullis, 9 N. B. R. 433; 18 Wall. 382.

89. S. B. & Co. held a lien as security of the bankrupt on letters patent of the bankrupt. It was ordered by the court that said letters patent should be sold jointly by the assignee and S. B. & Co., and the funds deposited pending settlement of suit. In re Columbian M. Works, 3 N. B. R. 18; Fed. Cas. 3,039.

90. Where the parties holding liens are in a condition to enforce the lien without aid of the courts or their officers, the district court will not interfere except upon a showing that the interests of the general creditors require it. Pennington v. Sale et al., 1 N. B. R. 157; 2 Amer. Law Rev. 776; Fed. Cas. 10,938.

91. A court of bankruptcy has power to order the sale of the incumbered property of the bankrupt, and the money arising from the sale brought into court to be distributed among the creditors holding the securities. In re Salmons, 2 N. B. R. 19; 15 Pittsb. Leg. J. (O. S.) 541; Fed. Cas. 12,268.

92. In an action by lien-holders, a judgment may be rendered limiting the plaintiffs to a sale of the land, where it appears that, by reason of their discharge in bankruptcy, the defendants are released from personal liability. Reed v. Bullington, 11 N. B. R. 408.

93. Property which has been mortgaged by a bankrupt may be sold by an assignee discharged of the incumbrances, the lien being remitted to the proceeds, provided the rights of the mortgagee will not be injuriously affected, and the assignee may, for the purpose of such sale, expend money upon

finishing chattels which he finds in an unfinished condition. Foster, Ass., v. Ames, 3 N. B. R. 147; 1 Lowell, 813; 2 Amer. Law T. Rep. Bankr. 65; Fed. Cas. 4,965.

94. United States courts may authorize an assignee to redeem realty and discharge a lien, or may order the property to be sold and ascertain the debt secured by the lien, in which case the debt would be preferred in distributing the proceeds, the purchaser taking it discharged from incumbrances. Markson et al. v. Haney, 12 N. B. R. 484.

## X. MECHANICS'.

### (a) *Generally.*

See CLAIMS, 200.

95. The lien act of Oregon gives a lien from the commencement of the labor or the delivery of the material furnished, the filing of the notice being a condition subsequent. In re Coulter, 5 N. B. R. 64; 2 Sawy. 42; 1 Amer. Law T. Rep. Bankr. 257; 3 Chi. Leg. News, 877; 4 Amer. Law T. 181; Fed. Cas. 3,276.

96. A creditor having knowledge of the insolvent condition of his debtor obtained a lien on the property of said debtor, the latter having made no defense to the suit. *Held*, the lien was valid and was not displaced by subsequent bankruptcy proceedings within four months. Wilson v. City Bank, 9 N. B. R. 97; 17 Wall. 478.

97. The bankrupt law makes no distinction between the different kinds of liens. If the law of the state recognizes a lien by judgment or in favor of a mechanic, or by mortgage, each is respected in the bankrupt court. Whenever the creditor has the right to have a debt satisfied from the proceeds of property, or before the property can be disposed of, it is a lien on such property. Meeks v. Whatley, 10 N. B. R. 498.

98. A claimant sued out a writ of attachment against a bankrupt for building materials furnished, and attached the bankrupt's interest in the premises, and then discontinued the action. Prior to the discontinuance of the lien suit, the claimant proved his claim in bankruptcy, setting forth the nature of his claim and the commencement of his action therefor, and claiming the same as a valid lien. *Held*, that his claim was entitled

to the rights of a lien under the bankrupt law. *Bucknam v. Dunn et al.*, 16 N. B. R. 470; 2 Hask. 215; Fed. Cas. 2,096.

99. A mechanic's lien deriving its existence from a state statute, and dependent upon the commencement of a suit within a prescribed period, is not preserved as an incumbrance on the property, when no suit is commenced in the state court and no step is taken in the bankruptcy court equivalent to such suit within the time limited. In *re Brunquest*, 14 N. B. R. 529; 7 Biss. 208; Fed. Cas. 2,035.

100. A lien authorized by a statute on compliance with provisions concerning record and notice is not complete until the statutory requisites are complied with; and if these are postponed until after the filing of a petition, on which an adjudication follows, no lien will exist. In *re Sabin*, 12 N. B. R. 142; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 12,194.

101. A mechanic's lien for work done and material furnished which is not perfected prior to filing a petition in bankruptcy will not be recognized. In *re Dey*, 3 N. B. R. 81; 3 Ben. 450; Fed. Cas. 3,870.

102. A. filed a petition for lien for materials furnished, and before his lien was enforced he filed his petition in bankruptcy. *Held*, that the lien was not dissolved, and interference with the state court in the matter was refused. In *re Clifton et al. v. Foster et al.*, Ass., 3 N. B. R. 162.

### (b) *Maritime.*

See COMPOSITION, 63.

103. Against a vessel owned by a bankrupt there were three classes of liens: 1st. Maritime liens, as for seamen's wages, materials, supplies and repairs in ports of other states; 2d. Statutory liens; and 3d. Mortgage liens. *Held*, that the first class should have priority, the others attaching according to their dates. In *re Scott*, 3 N. B. R. 181; 9 Amer. Law Reg. (N. S.) 349; 18 Pittsb. Leg. J. 53; 1 Abb. (U. S.) 836; 12 Int. Rev. Rec. 129; 2 Chi. Leg. News, 898; Fed. Cas. 12,517.

104. Unless money furnished to a vessel is furnished to pay claims which would be liens upon it, there is no lien for such loan. The "*Home*," 18 N. B. R. 557; Fed. Cas. 6,657.

105. A material-man claimed a lien on

the funds obtained from the sale of a vessel owned by the bankrupt, on the ground that a state statute gave him a lien for repairs made to a vessel in her home port. *Held*, he had no lien, and was only a general creditor. In *re Edith*, 6 N. B. R. 449; 5 Ben. 482; Fed. Cas. 4,282.

## XI. SECURED.

See SECURED CLAIMS, 9, 27.

106. Where a creditor has a general lien, and the debtor, on receiving an accommodation from such creditor, deposits with him a particular security, specially intended or appropriated, or even pledged to meet such advance or to cover such accommodation, the security is subject not only to a particular lien for the advance, but also to the creditor's general lien. *Sparhawk et al. v. Drexel et al.*, 12 N. B. R. 450; 1 Wkly. Notes Cas. 560; Fed. Cas. 13,204.

107. Where a creditor claims a lien by judgment on November 5, 1866, but not recorded until the 16th of October, 1867, and another creditor holds a mortgage executed by the bankrupt, recorded on the 7th of April, 1867, *held*, that the mortgage lien has priority over the judgment. In *re Lacy*, 4 N. B. R. 15; 3 Amer. Law T. 215; 1 Amer. Law T. Rep. Bankr. 226; Fed. Cas. 7,970.

108. A banker has no lien upon the moneys of depositors for any debt which the depositor may be owing him, and he has no right to apply the same to the payment of such debt without the consent of the depositor. In *re Warner et al.*, 5 N. B. R. 414; Fed. Cas. 17,177.

109. A bank organized according to section 35 of the national currency act has, in order to prevent loss upon a debt previously contracted, a lien upon the share of an individual stockholder, and can apply the same as well to the payment of individual as partnership indebtedness. In *re Bigelow et al.*, 1 N. B. R. 202; 2 Ben. 469; Fed. Cas. 1,395.

110. A single creditor, whose debt is secured by a lien on bonds of a greater value than his debt, cannot be permitted to abandon all remedies for the collection of his debt and claim the jurisdiction of the district court in bankruptcy for the purpose. In *re Johann*, 4 N. B. R. 143; 2 Biss. 189; Fed. Cas. 7,331.

111. Where liens on the property of a bankrupt are valid, and exceed in value the real estate incumbered by them, there is no necessity for the exercise of the powers of a bankrupt court. In re Dillard, 9 N. B. R. 8; 2 Hughes, 190; 6 Amer. Law T. Rep. 490; 21 Pittsb. Leg. J. 82; Fed. Cas. 3,912.

112. A lien by way of mortgage can only be created by a deed under seal. In re St. Helens M. Co., 10 N. B. R. 414; 3 Sawy. 88; 8 West. Jur. 597; Fed. Cas. 12,222.

113. The creditor who has a lien on property for the payment of his debt is admitted as a creditor only for the balance of the debt after deducting the proceeds of such property. In re Winn, 1 N. B. R. 181; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

## XII. IN GENERAL.

See LEASE, 5; AGENT, 16; ARREST, 20; CONSTITUTIONAL LAW, 12; COURTS, II, (b).

114. If liens have been acquired *bona fide* and are recognized by the state law, they have the same priorities as though no proceedings in bankruptcy had taken place. Reed v. Bullington, 11 N. B. R. 408.

115. The bankrupt law makes no distinctions between different kinds of liens, whether by mortgage, judgment or otherwise. *Id.*

116. Every creditor of the bankrupt is a defendant in the proceeding, and if he have a lien, and wish to protect it, he must disclose its character that it may be ascertained and liquidated. In re Bridgman, 1 N. B. R. 59; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 1,866.

117. When not prohibited by the bankrupt act liens and preferences are entitled to the same protection from the bankrupt courts as other legal rights. Barron et al. v. Morris, Ass., 14 N. B. R. 371; Fed. Cas. 1,055.

118. All valid liens which exist on the property of a bankrupt when the proceedings are commenced are preserved, and will be respected by the bankruptcy court, and enforced and allowed to be paid out of the proceeds of the property on which they are liens. In re Grinnell et al., 9 N. B. R. 20; 7 Ben. 42; 21 Pittsb. Leg. J. 82; Fed. Cas. 5,830.

119. Whenever the law gives a creditor a right to have a debt satisfied from the pro-

ceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of his debt. In re Wynne, 4 N. B. R. 5; Chase, 227; 9 Amer. Law Reg. (N. S.) 627; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

120. A creditor having a lien upon the estate of a bankrupt proved his debt and asserted his lien in the bankrupt court, and actively participated at every step of the adjudication. *Held*, that he was bound by his election and was not entitled to have his lien enforced by a state court. Spilman v. Johnson, 16 N. B. R. 145.

121. A claim of a broader lien than the facts warrant will not affect the actual lien of the creditor. McKinsey et al. v. Harding, 4 N. B. R. 10; Fed. Cas. 8,866.

122. An officer is bound by his return, and where such return shows an attachment it shows also a lien upon the property attached; and where such attachment was made more than four months prior to the bankruptcy proceedings, the plaintiff is entitled to a judgment against the specific property returned upon the writ. Bowman v. Harding, 4 N. B. R. 5.

123. A personal claim of indebtedness against a bankrupt's estate does not constitute a lien upon property in the hands of one making such claim. In re Krogman, 5 N. B. R. 116; Fed. Cas. 7,936.

124. Advances made on a crop on condition that the crop should be consigned to the party advancing does not create a lien on such crop. Allen et al. v. Montgomery, 10 N. B. R. 503.

125. A prior lien gives a prior claim, and the district court may ascertain and liquidate the lien. In re Winn, 1 N. B. R. 131; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

126. Where partnership debts are outstanding, on which a bankrupt's partner is liable, such partner has a lien on the real estate of the firm, until the debts are paid, to indemnify him in the event of his having to pay them. Thrall v. Crampton, Ass. etc., 16 N. B. R. 261; 9 Ben. 218; Fed. Cas. 14,008.

127. Anything that is a valid lien or security upon property by the laws of any state is exempted from the operation of the bankrupt act of 1841. Peck v. Jenness, 7 How. 612; Ex parte City Bank of New Orleans, 3 How. 292.

**LIFE INSURANCE.**

See INSURANCE, II.

**LIFE TABLES.**

In determining the expectations of life of a man, a court must ascertain the actual probable expectation of life of the party as he is, or adopt some recognized approximate standard as its measure, in order to capitalize the interest he is entitled to for life. *Shippen and Robbins*, 15 N. B. R. 553.

**LIMITATIONS, STATUTE OF.****I. PLEADING.****II. TIME OF RUNNING.****III. DEBTS BARRED THEREBY.****IV. NEW PROMISE.****V. SUIT BY TRUSTEE.****VI. IN GENERAL.**

See PLEADING AND PRACTICE, 287; SUITS, 2.

**I. PLEADING.**

1. Where an assignee brings suit to recover property fraudulently concealed by the bankrupt, and the period of limitation prescribed by the bankrupt act for bringing such a suit has expired, a demurrer to the bill will be sustained. *Andrews, Ass., v. Dole et al.*, 11 N. B. R. 352; Fed. Cas. 373.

2. A demurrer to a petition of an assignee to recover property fraudulently conveyed by one who claims by virtue of a voluntary assignment of the debtor will not be sustained simply on the ground that more than two years have elapsed since the cause of action accrued. In *re Krogman*, 5 N. B. R. 116; Fed. Cas. 7,936.

3. The bankrupt having been a non-resident when the cause of action accrued, and it not appearing when he became a resident, nor that since the cause of action accrued he had resided more than three years in the state, although a corporation of another state was the creditor, *held*, that the assignee could not set up the state act of limitations as a defense. *Capelle, Ass., v. The Trinity M. E. Church*, 11 N. B. R. 536; Fed. Cas. 2,392.

4. In an action by a purchaser to recover

possession of land sold by an assignee, the defendant pleaded the two years' limitation of suits by and against an assignee. *Held*, that such plea was not available. *Steele v. Moody*, 16 N. B. R. 558.

5. An assignee brought an action to recover possession of certain real estate. The defendant pleaded the statute of limitations, and it appeared that the period of limitation had expired. The assignee claimed to be relieved from the bar by the averment that he did not discover the property until a short time before the institution of his action. *Held*, that the right of action was barred. *Norton, Ass., v. De La Villebeuve*, 13 N. B. R. 304; 1 Woods, 163; 2 N. Y. Wkly. Dig. 4; Fed. Cas. 10,350.

**II. TIME OF RUNNING.**

See DISCHARGE, 213, 214, 215, 217.

6. Three men were partners, and after two years ceased business. Several years later one of the three was adjudicated a bankrupt and received his discharge. The assignee sold all the assets and the bankrupt became the purchaser and afterward brought an action on one of the claims. The defendant pleaded the statute of limitations. *Held*, that the statute ran from the time of adjudication. *Blackwell v. Claywell et al.*, 15 N. B. R. 300.

7. An assignee in bankruptcy brought an action to foreclose a mortgage given by K. to the bankrupts. K. pleaded a set-off which was not barred by the statute of limitations at the time of the adjudication, but which accrued more than six years before the action. *Held*, that the statute of limitations did not run against K.'s claim, as it was not barred at the time of adjudication. *Von Sachs, Ass. etc., v. Kretz et al.*, 19 N. B. R. 83.

8. Where the statute of limitations has begun to run against the right of an assignee in bankruptcy to redeem from the foreclosure, sale and conveyance of real property of the bankrupt, the law continues to run against the subsequent grantee of the same property by conveyance from the assignee. *Greene v. Taylor*, 132 U. S. 415.

9. When the bankrupt omitted to mention life policies in his schedules in bankruptcy, and neither he nor his administrator

informed the assignee of them, and where they take no means to conceal them, it does not establish fraudulent concealment so as to prevent the running of the statute of limitations. *Avery v. Cleary*, 132 U. S. 604.

10. Where there has been an absence of negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and where the fraud has been concealed or is of such a character as to conceal itself, the statute of limitations as to suits by a bankrupt's assignee does not begin to run until the fraud is discovered by or becomes known to the parties suing or those in privity with him, or ought to be so discovered or known. *Pearsall v. Smith*, 149 U. S. 231.

11. The surety's right of action is not complete until he pays; hence the statute of limitation does not begin to run until that time. In *re Perkins et al.*, 10 N. B. R. 529; 6 Biss. 185; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 135; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 43; Fed. Cas. 10,983.

12. The running of the statute of limitations is arrested by the filing of a petition in bankruptcy. In *re Maybin*, 15 N. B. R. 468; Fed. Cas. 9,337.

13. In suits in equity, where the party injured by a fraud remains in ignorance of it, without fault on his part, the bar of the statute does not begin to run until the fraud is discovered. *Bailey, Ass., v. Weir et al.*, 12 N. B. R. 24.

14. Though by the civil code of Louisiana it is provided that bills and notes are prescribed in five years from their maturity, and that this prescription runs against minors, interdicted persons and persons residing out of the state, *held*, that the rebellion interrupted the running of the prescription in favor of a creditor who, during the war, resided in one of the loyal states. *Levy v. Stewart & Co.*, 4 N. B. R. 193; 11 Wall. 244.

15. The statute of limitations of the state which is the bankrupt's residence applies to proof of debts against his estate; and after adjudication in bankruptcy, the statute continues to run, and no claim can be enforced against the estate unless action could be maintained on it in the state courts. *Nicholas, Ass., v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

16. In relation to suits by and against assignees, the limitation of the bankrupt act applies to a suit in equity which the assignee has brought to charge the stockholders of the bankrupt corporation for the amount unpaid on their shares. The statute begins to run when the estate vests in the assignee. *Foreman, Ass., v. Bigelow*, 18 N. B. R. 457; 7 Reporter, 137; 26 Pittsb. Leg. J. 123; Fed. Cas. 4,934.

17. The statute of limitations ceases to run against the creditor at the commencement of the proceedings in bankruptcy, and if not barred at that time his claim may be proved afterwards, though at the time of proof it would be otherwise barred. In *re Eldridge & Co.*, 12 N. B. R. 540; 2 Hughes, 256; 1 N. Y. Wkly. Dig. 243; Fed. Cas. 4,331.

18. The statute of limitations did not run during the civil war. *Id.*

19. The proof of a claim in bankruptcy is not a suit the commencement of which is *per se* necessary to suspend the running of the statute of limitations. *Id.*

### III. DEBTS BARRED THEREBY.

See CONFLICT OF LAWS, III; DISCHARGE, 201.

20. On a motion to expunge the proof of a debt against which the statute of limitations had run, *held* that, said debt having been included in the debtor's schedules, it was provable. In *re Hertzog*, 18 N. B. R. 526; Fed. Cas. 6,433.

21. The assignee of a bankrupt resisted a claim on the ground that it was barred by the statute of limitations. *Held*, that an acknowledgment of the debt by the debtor before the bar was sufficient, though it would not amount to a new promise after the debt was barred. In *re Reed*, 11 N. B. R. 94; 6 Biss. 250; 7 Chi. Leg. News, 76; Fed. Cas. 11,635.

22. A bankrupt set forth in his schedule a debt due a creditor which was barred by the statute of the state in which both resided and where the debt was contracted. On the creditor seeking to examine the bankrupt he objected. *Held*, that the debt was provable, unless it were shown to be barred throughout the United States, and that the creditor had a right to examine the bankrupt. In *re Ray*, 1 N. B. R. 96.



23. A creditor whose claim was barred by limitation at the time of the alleged removal of property will not be heard in opposition to a bankrupt's discharge. In re Burk, 3 N. B. R. 76; Deady, 425; 2 Amer. Law Rep. Bankr. 45; Fed. Cas. 2,156.

24. The plaintiff was appointed assignee March 21, 1874. July 8, 1874, the district court ordered him to collect assets, and March 20, 1876, he instituted suit, but the summons was not issued until November 1, 1876. *Held*, that the assignee's action was barred by the two years' limitation in the bankrupt act. Walker, Ass. etc., v. Towner, 16 N. B. R. 285; 4 Dill 165; 5 Cent. Law J. 206; Fed. Cas. 17,089.

25. The creditor of a bankrupt filed his proof of a debt which was by the laws of the state barred by the statute of limitations. *Held*, that the claim could not be allowed. In re Doty, 16 N. B. R. 203; 1 N. W. Rep. (O. S.) 165; 10 Chi. Leg. News, 1; 25 Pittsb. Leg. J. 24; Fed. Cas. 4,017.

26. A debt barred by the statute of limitations of the state where the bankrupt resides cannot be proved against his estate in bankruptcy. In re Kingsley, 1 N. B. R. 52, 66; 1 Lowell, 216; 7 Amer. Law Reg. (N. S.) 423; 15 Pittsb. Leg. J. 235, 277; Fed. Cas. 7,819.

27. A debt barred by the statute of limitations of Maine, where the bankrupt resides, cannot be proved against his estate in bankruptcy by a creditor resident in another state, notwithstanding that such demand is not barred by the statute of limitations in the state where the creditor resides. In re Harden, 1 N. B. R. 97; 1 Hask. 163; 1 Amer. Law T. Rep. Bankr. 48, 119; 15 Pittsb. Leg. J. 343; Fed. Cas. 6,048.

28. A debt barred by the statute of limitation in the state in which the bankrupt resides may still be proven against his estate in bankruptcy. In re Sheppard, 1 N. B. R. 115; 7 Amer. Law Reg. (N. S.) 484; 1 Amer. Law T. Rep. Bankr. 49; Fed. Cas. 12,753.

29. The fact that a creditor's remedy, by suit in New York, is barred by the statute of limitations, does not prevent the proof of his debt or bar his right to oppose the discharge of the bankrupt. *Id.*

30. A debt barred by the statute of limitations of the state in which the proceedings are pending is not provable against the estate

of the bankrupt, and cannot be reckoned in computing the number necessary to join in an involuntary petition in bankruptcy. In re Noesen, 12 N. B. R. 422; 6 Biss. 443; 7 Chi. Leg. News, 419; 1 N. Y. Wkly. Dig. 125; 2 Cent. Law J. 570; Fed. Cas. 10,288.

31. The petitioner in involuntary bankruptcy claimed to be a creditor by reason of a claim which was barred by the statute of limitations. He claimed that the bankrupt court was not bound by the state statute. The petition was dismissed. In re Cornwell, 6 N. B. R. 305; 9 Blatchf. 114; 6 Amer. Law Rev. 365; Fed. Cas. 3,250.

32. A petitioner alleging a claim which is barred by the statutes of limitation cannot maintain a petition in involuntary bankruptcy for an adjudication declaring his alleged debtor a bankrupt. *Id.*

33. The law did not impose an absolute limit of two years after the assignee's appointment to his right of action in respect to transactions which occurred prior to his appointment, and there is no want of power in the court to entertain a suit after such two years have elapsed. It is too late to raise the point that the action is barred by the statute of limitations, for the first time in the appellate court. Upton v. McLaughlin, 105 U. S. 640.

#### IV. NEW PROMISE.

##### See DISCHARGE, XIX.

34. If there be no express promise, but a promise is to be raised by implication from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, for which the party is liable and willing to pay. In re Harden, 1 N. B. R. 97; 1 Hask. 163; 1 Amer. Law T. Rep. Bankr. 49, 119; 15 Pittsb. Leg. J. 343; Fed. Cas. 6,048.

35. To the defendant's plea of discharge in bar of an action on a note, the plaintiff replied a new promise in writing made while proceedings were pending, as follows: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay. All will be right betwixt me and my just creditors." *Held* that, having been discharged from all debts, the language used did not re-

vive the debt in suit. *Allen & Co. v. Ferguson*, 9 N. B. R. 481; 18 Wall. 1.

36. A promise to pay when able a debt already barred by the statute of limitations is a conditional promise and will not revive the debt until the ability to pay appears; but if it is a present debt such a promise does not prevent a suit or stop the running of the statute. *In re Cornwell*, 6 N. B. R. 805; 6 Amer. Law Rev. 365; Fed. Cas. 3,250.

37. The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will revive the debt. *In re Kingsley*, 1 N. B. R. 66; 1 Lowell, 216; 7 Amer. Law Reg. (N. S.) 423; 15 Pittsb. Leg. J. 235, 277; Fed. Cas. 7,819.

38. A new promise to pay a debt, after discharge in bankruptcy, revives the debt. *Classen v. Schoeneman*, 16 N. B. R. 98.

39. The appellee sued on a promissory note; the appellant pleaded a discharge as bankrupt; the appellee replied a new promise. *Held*, that the new promise must be clear, distinct, express and unequivocal; and, if it is so, it will revive the liability. *St. John v. Stephenson*, 19 N. B. R. 227.

40. A bankrupt was discharged, but subsequently confessed judgments for debts owing prior to the discharge. *Held*, that the old debts were sufficient considerations for the judgments, but that the judgments did not revive the old debts but created new ones. *Dewey v. Moyer*, 18 N. B. R. 114.

41. A debtor discharged gave new notes for pre-existing ones to a creditor who signed the resolution. The debtor again went into bankruptcy. *Held*, that the claim so renewed was not to be postponed to claims of new creditors. *In re Merriman's Estate*, 18 N. B. R. 411; 44 Conn. 587; 26 Pittsb. Leg. J. 120; Fed. Cas. 9,479.

42. The filing of the petition by a bankrupt and his including the claim of a creditor in the schedule of debts is equivalent to a new promise, so as to prevent the claim, if not already barred, from being defeated by the statute of limitations. *In re Eldridge & Co.*, 12 N. B. R. 540; 2 Hughes, 256; 1 N. Y. Wkly. Dig. 243; Fed. Cas. 4,331.

#### V. SUIT BY TRUSTEE.

43. The limitation of two years, in section 2 of the act of 1867, applies only to suits

as to which, by said section, concurrent jurisdiction is given the circuit court, and wherein the assignee must proceed in a plenary way, and does not apply to the collection of ordinary debts due the bankrupt prior to the adjudication. *Smith v. Crawford*, 9 N. B. R. 88; 6 Ben. 497; Fed. Cas. 13,030.

44. More than two years after his appointment an assignee was substituted as plaintiff in an action commenced in the name of the bankrupt, and a recovery was had. *Held*, that the bankrupt could not claim the amount recovered on the ground that the limitation of the bankrupt law barred his remedy at the time of the substitution. *Maybin v. Raymond, Ass.*, 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,338.

45. All fraudulent transactions which are so by the common law or by the statute law, other than the special limitations in the bankrupt act, are governed by the limitation of two years upon the assignee in bringing the suit. *Bean v. Brookmire*, 4 N. B. R. 57; 10 Amer. Law Reg. (N. S.) 181; 4 West. Jur. 392; 1 Dill. 25; Fed. Cas. 1,168.

46. The statute limitation of two years, provided for in the bankrupt act, is a bar to a recovery by the assignee or creditors, if the assignee refuses or has no notice of property conveyed by the insolvent in fraud of creditors. *Freeland v. Holloman et al.*, 9 N. B. R. 331; Fed. Cas. 5,081.

47. A bankrupt, a British subject, held a claim against the United States, which was marked on his schedule as worthless, and was sold for \$20 to W., who purchased it with money furnished by the bankrupt. Afterwards an award was made by a commission for \$187,190. *Held*, that the limitation contained in the Revised Statutes, section 5057, relates only to suits by or against an assignee with respect to parties other than the bankrupt. *Phelps, Ass., v. McDonald et al.*, 19 N. B. R. 187; 99 U. S. 298.

48. A bankrupt executed trust deeds of property. He afterwards conveyed his equities in said property to his son, and in the following year was adjudged a bankrupt. Three years later the assignee applied to the court for leave to sell the assets, not including the equities so conveyed to the son. An order of court, however, included the equities so conveyed to the son, and the same was sold to the complainant. In a suit by

the purchaser to set aside the conveyance to the son, *held*, that the assignee's right of action was acquired at the date of his appointment and was barred by limitation before the sale, and that complainant did not, by a conveyance made to him, acquire any greater rights than those possessed by the assignee. *Gifford et al. v. Helms et al.*, 19 N. B. R. 113; 98 U. S. 248.

49. The time within which an assignee in bankruptcy could commence an action under the act of 1867 began to run when the assignee was appointed. *International Bank v. Sherman*, 101 U. S. 403.

50. An action by or against an assignee in a state court must be brought within two years from the time the cause of action accrued, and the assignee cannot by amendment be made a party, more than two years after his appointment, to a suit brought by or against the bankrupt. *Cogdell, Ass. v. Exum*, 10 N. B. R. 327.

51. The limitations of four and six months prevent the assignee from setting aside transfers of property made prior to such periods only where he must rely upon the bankrupt alone to establish their invalidity. *Hyde v. Sontag et al.*, 8 N. B. R. 225; 1 *Sawyer*, 249; *Fed. Cas.* 6,974.

52. The purchaser of land from an assignee is equally bound by the limitation of time within which to bring suit against an adverse claimant. *Wisner v. Brown*, 122 U. S. 214.

53. A suit by an assignee to recover the proceeds of policies of insurance on the life of the bankrupt, received by the defendant claiming under the assignment from the bankrupt, is a suit between the assignee in bankruptcy and a corporation claiming an adverse interest within the meaning of the law, and is therefore barred by the two years' limitation provided by the same. *Cleary v. Ellis Foundry Co.*, 132 U. S. 612.

54. Where a part of certain securities claimed were delivered to an assignee, the cause of action in regard to those delivered accrued to him at the time of such delivery; but it did not depend upon or arise from the existence or ascertainment or insufficiency of the other securities to meet the debt. *Doe v. Hyde*, 114 U. S. 247.

55. Where an assignee in bankruptcy discontinues a suit in a district court and begins another in the circuit court, for a decree to surrender premises granted by the bankrupt to his children, the suit in a circuit court was a discontinuance of the former one within the two years' limitation of the act of 1867. *Adams v. Collier*, 122 U. S. 382.

## VI. IN GENERAL.

56. The statute of limitations does not run against direct trusts, but does against implied or resulting trusts. In *re O'Neale*, 6 N. B. R. 425; *Fed. Cas.* 10,512.

57. Instead of subjecting the bankrupt to the liability of having the validity of his discharge called in question in all suits that should be brought against him, or provable, under the bankrupt act, for an indefinite time, the provision in the act of 1867 was intended to limit all contestants to the period of two years from the date of the discharge and to the tribunal therein specified, in respect to the time and mode of annulling his discharge. *Pickett, Ass. v. McGavick*, 14 N. B. R. 236; 3 *Cent. Law J.* 303; 18 *Alb. Law J.* 218, 400; 2 *N. Y. Wkly. Dig.* 878; *Fed. Cas.* 11,126.

58. Unless congress has otherwise provided, state statutes of limitation are applied to controversies in the courts of the United States with the same effect as they would be if the controversies were pending in the courts of the state. *Martin v. Smith*, 4 N. B. R. 83; 1 *Dill* 85; *Fed. Cas.* 9,164.

59. The limitation in the bankrupt law applies to causes of action accruing before the adjudication as well as to those accruing after. *Norton, Ass. v. De La Villebeuve*, 13 N. B. R. 304; 1 *Woods*, 163; 2 *N. Y. Wkly. Dig.* 4; *Fed. Cas.* 10,350.

60. The defense of the statute of limitations should be allowed wherever that defense is allowable in the state where the debtor resides. In *re Reed*, 11 N. B. R. 94; 6 *Biss.* 250; 7 *Chi. Leg. News*, 76; *Fed. Cas.* 11,635.

## LUNATIC.

See INSANITY.

**MANDAMUS.**

1. Under a provisional warrant the marshal seized goods alleged to belong to a third party, certain creditors having petitioned that a firm be adjudicated bankrupt. Thereupon the third party sued the marshal and four of the petitioning creditors in a state court in trover. The marshal, the assignee and the four creditors, in a bill in equity, prayed that the transfer to the third party be set aside. On this an injunction was granted staying the court's action. A third party asked a *mandamus* to vacate the injunction. *Held*, that a writ of *mandamus* would not lie, and the proper remedy was by appeal. *Ex parte Schwab*, 18 N. B. R. 507; 98 U. S. 240.

2. A state constitution adopted subsequent to the time judgment was recovered, but prior to its enforcement, allowed a "homestead of realty to the value of \$2,000." In a writ of *mandamus* to compel the sheriff to make a levy on the land claimed as exempted under the new constitution, *held*, that the provision concerning the homestead impaired the obligation of the contract to enforce which the judgment was recovered, and was therefore void. *Gunn v. Barry*, 8 N. B. R. 1; 15 Wall. 610.

**MANUFACTURER.**

See DEFINITIONS, 14, 15, 16.

**MARITIME.**

See LIENS, X, (b).

**MARRIAGE SETTLEMENTS.**

See MARRIED WOMAN, III.

**MARRIED WOMAN.****I. AS WITNESS.****II. RIGHTS IN REAL ESTATE.****(a) In General.****(b) By Fraud.****III. SEPARATE ESTATE.****IV. IN GENERAL.**

See EXEMPTIONS, 15, 42, 43, 52, 103; INSURANCE, 8, 10; MORTGAGES, 104; SALES, 18; SUITS, 20; TRUST, 5, 7.

**I. AS WITNESS.**

See EVIDENCE, 11, 12, 15, 16; COURTS, 283; DISCHARGE, 231.

1. The wife of a bankrupt is entitled to witness fees for attendance and travel. In *re Griffin*, 1 N. B. R. 83; 2 Ben. 209; 1 Amer. Law T. Rep. Bankr. 129; Fed. Cas. 5,810.

2. An order was issued by the register, requiring the wife of a bankrupt to be examined at the time and place specified therein, which was served on the bankrupt, but not on the wife, and the wife failed to attend. *Held*, that the bankrupt was not entitled to a discharge in the absence of proof that he was unable to procure the attendance of his wife. In *re Van Tuyl*, 2 N. B. R. 177; 3 Ben. 237; 1 Chi. Leg. News. 326; Fed. Cas. 16,879.

3. The wife of a bankrupt may be examined in bankruptcy. In *re Campbell*, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

4. A creditor, though the wife of the bankrupt, is a competent witness. In *re Richards*, 17 N. B. R. 562; 10 Chi. Leg. News, 275; Fed. Cas. 11,770.

**II. RIGHTS IN REAL ESTATE.****(a) In General.**

See DISCHARGE, 277; ESTATES, 32, XII.

4a. When a settlement is made by a husband free from debt, when it is induced by no fraudulent motive and makes no more than a reasonable provision for the wife, a court of equity will uphold it. Though the grant contains reservations tending to impair the benefit of the provision, yet, if the grant confers any substantial benefit on the wife, a court of equity will protect her. *Jones, Ass. v. Clifton*, 18 N. B. R. 125; 17 Amer. Law Reg. (N. S.) 713; 6 Reporter, 324; 7 Cent. Law J. 89; Fed. Cas. 7,457.

5. A post-nuptial settlement made in consideration of the relinquishment of dower and of maintenance, especially where the wife's trustee joins in the covenants that the wife will, in consideration of the settlement, relinquish all claims to dower in her husband's estate, and will contract no debts on his account, is for a valuable consideration, and will be upheld in law, and cannot be assailed in equity by the husband's creditors, unless the amount so settled is excessive. *Smith*

v. Kehr, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

6. In all cases of judicial sales of real property in which any married woman has an inchoate interest by marriage, unless by judgment of court that interest is sold or barred, it becomes absolute the same as in the case of the death of the husband. Warford, Ass., v. Noble et al., 19 N. B. R. 440.

### (b) *By Fraud.*

7. Where a debtor while insolvent purchased property in his wife's name, decrees against him are not liens upon the property, but a court of equity will pursue, for the benefit of creditors, the means so invested, and in equity the lien attaches on filing the bill. Winters et al. v. Claitor et al., 18 N. B. R. 533.

8. A bankrupt made an ante-nuptial settlement with fraudulent design. Held, that such settlement should not be annulled without clearest proof of the wife's participation in the fraud. Prewit et al. v. Wilson, Ass., 19 N. B. R. 461; 103 U. S. 22.

9. A person about to engage in a new business may not, for the purpose of securing his property for the benefit of himself and family, in case of loss, convey such property to his wife without consideration, it being a fraud upon subsequent creditors. Case v. Phelps et al., 5 N. B. R. 452.

10. The value of real or personal property conveyed to a wife in fraud of creditors cannot be recovered by a judgment *in personam* against the wife. Phipps et al. v. Sedgwick, Ass. etc., 16 N. B. R. 64; 95 U. S. 8.

### III. SEPARATE ESTATE.

See CLAIMS, 256; COMMERCIAL PAPER, 18; COMPOSITION, 51; CONVEYANCES, I, (h), II, (b); COURTS, 236, 237; ESTATES, XII.

11. The bankrupt agreed with a creditor to pay his claim in full on condition that the creditor would agree to a discharge. After the discharge a note was made for the difference between the claim and the dividend, which the wife of the bankrupt secured by a mortgage on her separate property. Held, the mortgage and note were void. Blasdel v. Fowle et al., 17 N. B. R. 412.

12. A promise by the husband to pay his

wife a sum equal to the proceeds of the wife's legacy, the promise being subsequent to the reduction of the legacy to possession, will not be supported by the right of the wife to have interposed a bill in equity to prevent her husband from reducing the chose in action to possession. Canby, Ass., v. McLearn, 13 N. B. R. 22; Fed. Cas. 2,378.

13. Where by the local law a married woman cannot charge her separate estate except for necessities, she is not eligible for surety on an assignee's bond. In re McFaden, 8 N. B. R. 27; Fed. Cas. 8,785.

14. The common-law rule that a married woman could not enter into copartnership or make any valid contract has been much relaxed, and the rule now seems to be that she may control and dispose of her separate property, incur liabilities, and that it may be subjected to the payment of her debts contracted about the management, improvement or even purchase of such property. In re Kinkead, 7 N. B. R. 439; 3 Biss. 405; 7 West. Jur. 110; 6 Amer. Law T. Rep. 45; 5 Chi. Leg. News, 217; 1 Amer. Law Rec. 533; 3 Bench & Bar (U. S.), 41; Fed. Cas. 7,824.

15. A married woman may carry on business on her own account, and even hire her husband and pay him wages, without her property becoming liable for his debts. Driggs, Ass., v. Russell et al., 8 N. B. R. 39; 1 Chi. Leg. News, 353; 2 Amer. Law T. 206; 1 Amer. Law T. Rep. Bankr. 160; Fed. Cas. 4,081.

16. Where the separate estate of the wife of a bankrupt had been used to erect a house, with an agreement that the deed to the house should be made to the wife, and where the wife voluntarily submitted to the bankruptcy proceedings, it was held the wife's claim should be paid out of the proceeds of the sale of the house prior to judgment creditors. In re Campbell, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

17. If a husband receives money from his wife and invests it in realty in her name until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee in bankruptcy. Muirhead, Ass. etc., v. Aldridge et al., 14 N. B. R. 249; 2 N. Y. Wkly. Dig. 480; 33 Leg. Int. 213; Fed. Cas. 9,904.

18. An involuntary petition was filed

against a married woman having a separate estate. *Held*, that as it did not appear that she intended to bind her separate estate, or that the notes were given for the benefit of said estate, or in the course of trade, the petition must be dismissed. In re Howland, 2 N. B. R. 114; 1 Chi. Leg. News, 168; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 6,791.

19. Real estate was conveyed to A. and his wife to be held in entirety. A.'s wife obtained a decree in divorce pending proceedings in bankruptcy. *Held*, if the divorce was to transform the tenancy to a tenancy in common, A.'s interest was a new acquisition which could not be claimed by his assignee. In re Benson, 16 N. B. R. 377; 8 Biss. 116; Fed. Cas. 1,828.

20. A bankrupt and his wife built a house on land bargained for by her and paid for in part from her separate means, and for which she afterwards paid the balance and took a deed. *Held*, that the assignee was entitled to a conveyance of the husband's interest less the amount he was authorized by law to invest in a homestead. Johnson, Ass., v. May et al., 16 N. B. R. 425; Fed. Cas. 7,897.

#### IV. IN GENERAL.

See EVIDENCE, 9; CHOSE IN ACTION, I; CLAIMS, 8; DISCHARGE, 291, 292, 329, 339; ESTATES, XII; PETITIONS, 55.

21. A bankrupt had purchased articles of luxury and given them to his wife while insolvent. They were not articles appropriated to the use of the wife. The wife attempted to hold them against the assignee, claiming that there must be a bill in chancery or suit at law to determine her rights. *Held*, that the bankrupt must answer the petition of the assignee, and if it appeared that the wife had an adverse interest she would be entitled to have the right determined in an independent proceeding. In re Pierce et al., 15 N. B. R. 449; 7 Biss. 426; 9 Chi. Leg. News, 800; 15 Alb. Law J. 517; Fed. Cas. 11,139.

22. A married woman may be adjudged a bankrupt, and there is no difference between voluntary and involuntary proceedings so far as the ability to adjudge a woman a bankrupt is concerned. In re Collins, 10 N. B. R. 835; 3 Biss. 415; Fed. Cas. 3,006.

23. A *feme covert* must engage in trade in

accordance with state statutes; not having done so and being incapacitated to make contracts, she may avail herself of coverture to defeat debts in bankruptcy. In re Slichter, 2 N. B. R. 107; Fed. Cas. 12,942.

#### MARSHAL.

##### I. DUTY.

##### II. AUTHORITY.

###### (a) *Generally.*

###### (b) *Under Provisional Warrant.*

##### III. ACTIONS AGAINST.

##### IV. FEES.

See REFEREE, 30; SALES, 12, 13.

##### I. DUTY.

1. The United States marshal, as messenger, is an officer of the court in bankruptcy, and must obey its orders and directions as such, and he must care for the interests of the creditors, and also have a care that the interests of the bankrupt shall be protected. In re Carrow, 4 N. B. R. 178; 41 How. Pr. 112; Fed. Cas. 2,426.

2. If a marshal undertakes the service of the warrant, the service of the order of adjudication by him is a necessary incident to that duty. In re Kennedy & Mackintosh, 7 N. B. R. 337; Fed. Cas. 7,699.

3. It is the marshal's duty under a warrant in bankruptcy proceedings to seize the bankrupt's property wherever it may be found, and, if suit is brought against him for such taking, the true ownership of the property is open for determination. Sharpe v. Doyle, 102 U. S. 686.

4. The court in bankruptcy under the act of 1867 had jurisdiction to order the seizure and division of the goods of the bankrupt, although in possession of another claiming title, and the officer might justify the seizure by proof that the property was at the time the bankrupt's. Fiebleman v. Packard, 108 U. S. 14.

##### II. AUTHORITY.

###### (a) *Generally.*

5. In the United States courts it is not necessary that the subpoenas for witnesses should be served by the marshal. Gordon,

McWilliam & Co. v. Scott & Allen, 2 N. B. R. 28.

6. When the warrant to the marshal transcends the power conferred by section 40 of the act of 1867, property taken possession of unlawfully under it will be returned on petition. In re Harthill, 4 N. B. R. 131; 4 Ben. 448; Fed. Cas. 6,161.

7. The marshal is not authorized to serve a subpoena to appear and answer in an equity suit outside of his district. Jobbins, Ass., v. Montague et al., 6 N. B. R. 117; 5 Ben. 425; Fed. Cas. 7,329.

8. In involuntary cases of bankruptcy the marshal alone is authorized, as messenger, to seize and retain the custody of the bankrupt's property until the assignee is appointed. In re Howes & Macy, 9 N. B. R. 423; 7 Ben. 102; Fed. Cas. 6,787.

### (b) *Under Provisional Warrant.*

See ESTATES, 280.

9. Prior to the commencement of bankruptcy proceedings, the bankrupt made a voluntary assignment to one R., who took possession, but failed to give the bond required by law. Under a provisional warrant granted in the bankruptcy proceedings, the marshal took possession of property transferred to R. by assignment. *Held*, that provisional warrant did not authorize marshal to take possession of property. In re Manahan, 19 N. B. R. 65; Fed. Cas. 9,008.

### III. ACTIONS AGAINST.

See COURTS, 97; ESTATES, 280.

10. The marshal is responsible if he seized the property not belonging to the bankrupt, and the petitioning creditors are bound to defend him in the suit by the claimant. In re Marks, 2 N. B. R. 175; 16 Pittsb. Leg. J. 12; 1 Chi. Leg. News, 245; Fed. Cas. 9,095.

11. If the United States marshal, in executing a warrant for the seizure of a bankrupt's property, seize that of a stranger, he renders himself liable to an action for trespass which may be brought in a state court. Marsh et al., Ex'rs, v. Armstrong, 11 N. B. R. 126.

12. Under section 25 of the bankrupt act of 1867, where property is unlawfully taken

by the marshal under a warrant of seizure, the amount of recovery is not limited to the amount received for the property at the assignee's sale, but the injured party may recover the actual value of the property. Doll v. Harlow, 11 N. B. R. 350.

### IV. FEES.

See COSTS AND FEES, II, (d).

13. A marshal as messenger is entitled to mileage for travel to make a return on warrant of bankruptcy. In re Talbot, 2 N. B. R. 98; 2 Amer. Law T. Rep. Bankr. 15; 1 Chi. Leg. News, 107; Fed. Cas. 13,727.

14. A marshal is entitled to charge for all necessary travel in serving papers, but section 47 of the bankrupt act of 1867 precludes constructive mileage, and therefore the place of service should be named in his return. In re Donahue & Page, 8 N. B. R. 453; Fed. Cas. 3,979.

15. Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of the same. In re Comstock et al., 9 N. B. R. 88; Fed. Cas. 3,075.

16. When a taxation is made, it is conclusive as respects the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of the bill taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee. In re Rein, 13 N. B. R. 551; 8 Ben. 384; Fed. Cas. 11,678.

17. The marshal is entitled to a fee of \$3 for serving a copy of the petition, as well as the order to show cause, on the debtor in an involuntary case (act of 1867). In re Burnell Bros., 14 N. B. R. 498; 7 Biss. 275; 9 Chi. Leg. News, 84; 8 Cent. Law J. 750; 22 Int. Rev. Rec. 386; Fed. Cas. 2,171.

### MARSHALING ASSETS.

#### I. CREDITORS' CLAIMS.

#### II. PARTNERS.

#### III. IN GENERAL.

#### I. CREDITORS' CLAIMS.

1. Where two parties have a lien upon one fund, and one party has a lien also upon a second fund, the party having a lien upon

the first fund can compel the other party to exhaust his remedy upon the second fund before he resorts to the first. *In re Jewett*, 1 N. B. R. 180; 7 Amer. Law Reg. (N. S.) 291; Fed. Cas. 7,304.

2. Where there are two funds, and one of them is subject to the lien of one suitor, and the lien of another suitor covers both, the latter suitor will be paid, if possible, out of the fund that is subject only to his own lien. *In re Ship Edith*, 6 N. B. R. 449; 5 Ben. 432; Fed. Cas. 4,232.

3. Where there are two classes of creditors having a common debtor who has several funds, and one class of creditors can resort to all the funds and the other to but part, the former shall take payment out of the fund to which they can resort exclusively; if the former resort to the fund common to both classes, to the loss of the latter, the latter are entitled to be substituted, to the extent of the deprivation to which they have been subjected, in the place of the former. *In re Foot et al.*, 12 N. B. R. 337; 8 Ben. 228; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 4,906.

4. The power of marshaling assets will not be exercised to the material injury of the creditor holding a claim upon both funds. A mere delay of payment is not a material injury, the interest on the claim being an adequate compensation for the delay. *In re Sauthoff et al.*, 14 N. B. R. 364; 7 Biss. 167; 5 Amer. Law Rec. 173; 8 Chi. Leg. News, 370; 8 Cent. Law J. 554; 3 N. Y. Wkly. Dig. 96; Fed. Cas. 12,379.

## II. PARTNERS.

5. Assets are to be marshaled between the creditors of the copartnership and the separate creditors of the partners, only where there are partnership assets and separate assets of individual partners, and proceedings have been instituted against the partnership and the individual members. *Am-sink et al. v. Bean, Ass.*, 11 N. B. R. 495; 22 Wall. 895.

6. If there be any joint fund, however small, the assets are to be marshaled according to the partnership rule, although the fund may have been created by the separate creditors purchasing some of the partnership assets for the purpose of creating it. *In re*

*Byrne*, 1 N. B. R. 123; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; 15 Pittsb. Leg. J. 315; Fed. Cas. 2,370.

## III. IN GENERAL.

7. A court of equity will not entertain the question of marshaling assets unless both funds are within the jurisdiction and control of the court. *Lewis, Trustee, v. United States*, 14 N. B. R. 64; 92 U. S. 618.

## MEETINGS.

### I. FIRST MEETING.

### II. SECOND MEETING.

### III. COMPOSITION.

### IV. IN GENERAL.

See REFEREE, 17; TRUSTEES, 14.

### I. FIRST MEETING.

See NOTICE, 2, 48.

1. Where the notice of the first meeting does not reach the creditors, and the court is satisfied that their votes would have changed the result and that they did not attend through failure of the notice, on their application the meeting should be re-opened and each vote received; but this relief should be sought promptly, and if one waits until the second meeting he cannot have the first meeting re-assembled without good cause for the delay. *In re Spencer*, 18 N. B. R. 199; Fed. Cas. 13,229.

2. At the first meeting of creditors, claims, to the proof of which there was objection, were postponed until after the appointment of an assignee, when they were again presented. *Held*, that the proof must be tendered as if it had not been presented at first meeting. *In re Herrman et al.*, 3 N. B. R. 161; 4 Ben. 126; Fed. Cas. 6,425.

3. At the first meeting a resolution was adopted in favor of winding up the bankrupt's estate by a trustee, and S. was nominated trustee and he and A. were nominated a committee to supervise the trustee. *Held*, the resolution will not be confirmed. *In re Stillwell*, 2 N. B. R. 164; Fed. Cas. 18,447.

4. When at the first meeting but one creditor proves his debt, he has the right to



choose the assignee. In re Haynes, 2 N. B. R. 78; 1 Gaz. 78; Fed. Cas. 6,289.

5. At the first meeting objection was made to the assignee proposed by the petitioning creditor, whereupon an adjournment was had. At the adjourned meeting the objecting creditors did not appear, and the register reported that no objection was made to the appointment. *Held*, that the former objections remained in force, and the appointment was vacated. In re Norton, 6 N. B. R. 297; Fed. Cas. 10,348.

6. A first meeting being called, and the deputy clerk presiding, and one of the alleged bankrupts being under examination, objection was made by a creditor that under General Order No. 36 (act of 1867) the meeting should be presided over by a register. Objection sustained. In re Holmes et al., 12 N. B. R. 86; 8 Ben. 74; Fed. Cas. 6,632.

7. There can be only one first meeting and all adjournments are a continuance. If objection to the appointment of an assignee is made, it is considered as continuing, and the register cannot appoint unless the objection is actually withdrawn. In re Norton, 6 N. B. R. 297; Fed. Cas. 10,348.

8. A meeting to prove debts and choose an assignee should be organized at the hour designated in the notice, and should be kept open until an assignee is chosen or it is ascertained that no choice can be made. In re Phelps et al., 1 N. B. R. 139; 2 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,071.

## II. SECOND MEETING.

9. The question was certified to the court whether, where no assets have come into the hands of the assignee, three months after adjudication the bankrupt applies for his discharge, there need be a second or third meeting of creditors. *Held*, that the notice to show cause in opposition to discharge need say nothing about such meetings. In re Townshend, 1 N. B. R. 1; 2 Ben. 62; Fed. Cas. 14,116.

10. No second meeting of creditors and no third or other meeting ought to be called by an assignee unless there be money in his hands for a dividend. In re Son, 1 N. B. R. 58; 2 Ben. 153; 15 Pittsb. Leg. J. 242; Fed. Cas. 13,174.

11. In cases of orders to show cause made

on petitions of bankrupts for discharge, no meeting of creditors, except the first, shall be ordered, unless assets have come to the hands of the assignee. When assets have come, the order to show cause should contain a provision for the holding of the second and third meetings, and for notices thereof. In re Robinson, 1 N. B. R. 49; 2 Ben. 145; 1 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,937.

## III. COMPOSITION.

See COMPOSITION, 12, VI.

12. The creditors are to decide on the sufficiency of the excuse for a debtor's absence from their meeting, and the court should not disturb such decision without good cause. In re Wronkow et al., 18 N. B. R. 81; 15 Blatchf. 38; 26 Pittsb. Leg. J. 2; Fed. Cas. 18,105.

13. It must appear wrong has been done to the minority creditors by the vote of the majority on a composition before the court will interfere. *Id*.

14. The rulings of the register on the right to vote in a composition meeting are subject to review by the court to determine whether the requisite majority of those present has assented to the composition. In re Spencer, 18 N. B. R. 199; Fed. Cas. 18,229.

## IV. IN GENERAL.

See ADJOURNMENT.

15. On petition to the court to pass on items of the assignee's account, reported favorably by the register on reference by the court to him, *held*, that the court would not, but that a general meeting of creditors must be called to act thereon. In re Hubbel et al., 9 N. B. R. 523; 19 Int. Rev. Rec. 150; Fed. Cas. 6,820.

16. Further meetings of creditors should not be called except for cause shown, and the register is justified in refusing to call them if he is satisfied that no such cause exists. In re Clark & Binger, 6 N. B. R. 194; Fed. Cas. 2,807.

17. In proceedings before the register the general creditors had not been notified to be present, but their assignee was present. *Held*, they were not entitled to notice. In re Campbell, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

**MERCHANT.**

See **COMMERCIAL PAPER**, 85; **DEFINITIONS**, 17, 18.

**MERGER.**

See **DISCHARGE**, 257; **FRAUD**, 100.

1. Where a judgment is recovered after the commencement of proceedings in bankruptcy, upon a debt which existed before that time, such debt is not so merged in the judgment as to deprive the creditor of a right to prove it. In re Brown, 8 N. B. R. 145; 5 Ben. 1; Fed. Cas. 1,975; In re Vickery, 8 N. B. R. 171; Fed. Cas. 16,980.

2. If a creditor reduces his claim against the bankrupt to a judgment, after proceedings are instituted in bankruptcy, the original claim becomes merged in the judgment, and he cannot afterwards prove his debt or interfere with the bankruptcy proceedings. In re Mansfield, 6 N. B. R. 388; Fed. Cas. 9,049.

3. A first mortgage ceases to have any validity or effect on the substitution of a second mortgage which not only changes the evidence of the debt but the security itself. In re Jordan, 9 N. B. R. 416; Fed. Cas. 7,529.

**MESSENGER.**

See **COSTS AND FEES**, 181, 182; **MARSHAL**, 1, 18.

**MILEAGE.**

See **COSTS AND FEES**, 105, 128, 182.

**MINOR.**

See **INFANT**.

**MISDEMEANORS.**

See **CRIMES AND OFFENSES**; **PLEADING AND PRACTICE**, 16, 17.

**MISJOINDER.**

See **PLEADING AND PRACTICE**, XV, (f).

**MISREPRESENTATION.**

See **PETITION**, 150.

**MODIFICATION.**

See **INJUNCTION**, IV.

**MORTGAGES.****I. VALID.****II. INVALID.****III. PRIOR AGREEMENT.****IV. HOMESTEAD.****V. LIENS UNDER.****VI. TRUSTEE'S RIGHTS.****VII. FORECLOSURE.****(a) General.****(b) In State Court.****(1) When Allowed.****(2) When Stayed or Enjoined.****VIII. SALES.****(a) General.****(b) Proceeds.****(c) Deficiency.****IX. EXCHANGE OF SECURITIES.****X. DEEDS OF TRUST.****XI. CHATTEL.****(a) General.****(b) Where Mortgagor Retains Possession.****(c) On After-acquired Goods.****(d) To Secure Future Advances.****(e) Recording.****XII. IN GENERAL.**

See **FRAUD**, 12; **INJUNCTION**, 45, 66, 69; **INSOLVENCY**, 29, 40; **JUDGMENT**, 7, 8; **PLEADING AND PRACTICE**, 174, 274; **PREFERENCES**, 88, 179-182, 184, 240; **SECURED CLAIMS**, 34; **SUITS**, 231.

**I. VALID.**

See **COSTS**, 86.

1. A mortgage or deed of trust executed as security for a debt is valid, if the creditor acted in good faith and had not reasonable cause to believe that his debtor was insolvent, even though such security was given out of the usual order of business of the debtor. Lee, Ass., v. Savings Inst. et al., 8 N. B. R. 53; 1 Chi. Leg. News, 870; Fed. Cas. 8,188.

2. Mortgages given for a present consider-

ation and for the purpose of enabling the mortgagor to carry on his business, and with no intent to delay creditors, do not constitute acts of bankruptcy. In re Sanford, 7 N. B. R. 852; Fed. Cas. 12,810.

3. A mortgage given in good faith, as the result of an inchoate transaction not consummated until the mortgage is recorded, cannot properly be regarded as having been given for a precedent debt, although it is recorded but the day before the petition in bankruptcy is filed. In re Westcott et al., 7 N. B. R. 285; 6 Ben. 185; Fed. Cas. 17,430.

4. A mortgage given in part for a past consideration, and in part for a present one, is valid as to the latter, though invalid as to the former. *Id.*

5. A mortgage executed by an insolvent debtor to secure an actual loan, made and taken in good faith, is valid. Campbell, Ass., v. Waite et al., 16 N. B. R. 98; 9 Ben. 166; Fed. Cas. 2,874.

6. Where a man makes a settlement upon his wife in fraud of his creditors, and his wife mortgages the property for value to one innocent of the fraud, though the settlement be afterwards set aside, the mortgagee's rights will be protected. Sedgwick v. Place, 10 N. B. R. 28; 12 Blatchf. 163; Fed. Cas. 12,621.

7. A mortgage by a railroad company, conveying its property in trust to secure bonds to be issued and sold and the proceeds to be applied to the payment of unsecured debts, is not rendered invalid by the circumstance that unsecured creditors are offered their election between taking the new bonds or the proceeds of the sale thereof. In re Union Pac. R. Co., 10 N. B. R. 178; 6 Chi. Leg. News, 855; 8 Amer. Law Rev. 779; 31 Leg. Int. 261; Fed. Cas. 14,376.

8. A bankrupt, within four months before bankruptcy, borrowed money and gave therefor a mortgage on his stock in trade which secured this loan, also a prior note which was already secured, and an overdue note which was taken up and held by the indorser, at whose request it was included in the mortgage. The stock was sold by the assignees, who held that the mortgage was void as to the overdue note, that it was an entirety, and therefore void *in toto*. On reference to the court, the claimant of the overdue note did not press his claim. *Held*,

that the mortgage could be severed, and the valid part was ordered paid. In re Stowe, 6 N. B. R. 429; Fed. Cas. 18,513.

9. A mortgage given by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. Such a mortgage is a waiver. In re Kahley, 4 N. B. R. 124; 2 Biss. 383; 3 Chi. Leg. News, 85; 2 Leg. Gaz. 405; Fed. Cas. 7,593.

10. The fact that the mortgagees allowed the property covered by the mortgage to remain in the possession of the mortgagor, bankrupt, after the condition of the mortgage was broken, in no way affected the validity of that instrument as between the parties. Mallack et al. v. Tritch, Ass., et al., 17 N. B. R. 293; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

11. A mortgage was made and recorded to secure the payment of notes to be negotiated to raise money to work the mortgagor's plantation. After the mortgage was recorded, it and the notes were placed in the hands of an agent for negotiation. The notes were finally negotiated before maturity. *Held*, that the mortgage was valid and binding on the mortgagor from the date of execution. In re York et al., 8 N. B. R. 163; Fed. Cas. 18,138.

12. A planter executed a mortgage of his plantation to secure advances of money to be used in the cultivation of the plantation, not to exceed \$25,000, all amounts to become due January 1, 1867. During the year 1866, advances to the amount of \$53,000 were made, and during the same period payments were made in excess of \$25,000. *Held*, that the mortgage was a security for the balance remaining unpaid January 1, 1867. *Id.*

13. A contracted with B. in October to sell grain on the Chicago market with reference to November. A. understood there was to be no delivery, he having no grain, but that he was to receive or pay the deficiency or excess of the price in November under or over the price sold for. B. contracted to deliver the grain to C., part of which he did, and for part he settled with C. without delivery according to the custom of the Chicago board of trade. A. gave B. notes and mortgages later to adjust the difference between them in the

transaction. A. becoming bankrupt his assignee sought to have the mortgages and notes set aside as wagering contracts. *Held*, they were valid. *Clark, Ass. etc., v. Fosset al.*, 17 N. B. R. 261; 7 Biss. 540; 10 Chi. Leg. News, 211; Fed. Cas. 2,852.

## II. INVALID.

See CLAIMS, 161; CORPORATIONS, 42; ESTATES, 262.

14. A mortgage given to secure a pre-existing debt, contracted outside of the ordinary course of business of the debtor, was held to be void. *Tuttle v. Truax*, 1 N. B. R. 169; Fed. Cas. 14,277.

15. A mortgage given with intent to prefer a creditor who had reasonable cause to believe the mortgagor insolvent, and knowing it to be made in fraud, and who actively concealed and withholds it from record for two months, is void, although executed more than two months before the filing of the petition in bankruptcy. *Blennerhassett v. Sherman*, 105 U. S. 100.

16. A mortgage covering a stock of lumber and moulding and all renewals thereof from time to time, and other property, although void as to the lumber and mouldings, may still be valid as to the other property. *In re Perrin*, 7 N. B. R. 283; Fed. Cas. 10,995.

17. B. took a chattel mortgage on selling out to his partner A., which was not to be filed until March 31st. On March 21st A. transferred his stock and notes, etc., to B. in payment of the amount, B. agreeing to pay the firm debts. A. was adjudged bankrupt. B. surrendered his preference and filed a claim for the whole amount. *Held*, that B. could only prove for the amount paid for the firm debts. *In re Stephens*, 6 N. B. R. 533; 3 Biss. 187; Fed. Cas. 13,365.

18. A bankrupt agreed with his creditor to pay his claim in full on condition that the creditor would agree to a discharge. After the discharge a note was made for the difference between the claim and the dividend, which the wife of the bankrupt signed and secured by a mortgage on her separate property without knowledge of the agreement. *Held*, the mortgage and note were void. *Blasdel v. Fowle et al.*, 17 N. B. R. 412.

19. More than four months prior to a debt-

or's filing his petition in bankruptcy, he had given a mortgage to secure a creditor, and within said four months he altered the substance of the security, but put no greater value into the creditor's hands than he had before. He also gave an original mortgage within said four months. The latter transaction was held void. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 839; 2 Lowell, 29; Fed. Cas. 12,410.

20. M. and C. were partners, and on dissolution M. purchased of C. his interest in the business, giving notes in payment and executing a mortgage on the stock and accounts to secure the notes. M. finally sold and transferred to C. the entire stock of goods. C. took possession and began making sales on his own account. M. was insolvent at the time of the sale. *Held*, that the mortgage was void. *Smith, Ass. v. McLean et al.*, 10 N. B. R. 260; Fed. Cas. 13,074.

21. A mortgage executed by a bankrupt after the commencement of proceedings in bankruptcy may be summarily set aside upon petition of the assignee without resort to equity. *In re Sims*, 16 N. B. R. 251; Fed. Cas. 12,888.

22. A mortgagee who knows that the mortgagor is unable to pay his debts, and that there are other creditors for amounts larger than his whose debts are unsecured, knows that a mortgage executed to secure his debt within the time prescribed by the bankrupt act is made in fraud of that act; and such mortgage will be set aside. *In re Armstrong*, 16 N. B. R. 275; 9 Ben. 212; Fed. Cas. 539.

23. If an insolvent debtor transfers his property to another, and the latter executes a mortgage thereon to secure a creditor, the transfer may be set aside. *Gibson, Ass. v. Dobie et al.*, 14 N. B. R. 156; 5 Biss. 198; Fed. Cas. 5,394.

24. S., a bankrupt, two months prior to the commencement of proceedings, mortgaged his stock of goods, it being understood before the mortgage was executed that the consideration he received should be paid to and accepted by a creditor for the same sum at which he received it, the mortgagee and creditor being present and active in the negotiation with the bankrupt. *Held*, that the onus of showing "good faith" and "act-

ual value," within the meaning of Revised Statutes, section 5128, was upon the mortgagee, and that he would not be allowed to enforce the mortgage. In re Sims, 19 N. B. R. 57; Fed. Cas. 12,889.

25. A bankrupt, as executor of one L, received \$11,820. Less than four months prior to filing a petition he made a mortgage for the amount on his real estate to himself as executor. Afterwards a prior mortgage was foreclosed, and on reference as to surplus moneys the assignee and bankrupt, as executor, appeared and contested the right to such surplus, and it was held that the mortgage was executed in fraud of the bankrupt law and was void. Bankrupt proved for the debt, and on motion to expunge, *held*, there was no voluntary surrender of mortgage by the creditor and he could not prove for any part of the debt. In re Dakin, 19 N. B. R. 181; Fed. Cas. 3,589.

26. A mortgage for \$4,000 was given, while only \$1,000 was advanced, and it was recorded in full. *Held*, that such exaggerated incumbrance is *prima facie* fraudulent as against the creditors of the mortgagor. In re Dumont, 4 N. B. R. 4; Fed. Cas. 4,127.

27. If a mortgagor conveys in fraud of the bankrupt act, actual notice must be brought home to the mortgagee who has taken the conveyance under circumstances promising material relief to the debtor, and apparently for that purpose. *Boothe, Ass. etc., v. Brooks et al.*, 12 N. B. R. 398; 1 N. Y. Wkly. Dig. 125; Fed. Cas. 1,650.

### III. PRIOR AGREEMENT.

28. A mortgage executed on individual property for an individual debt in pursuance of a parol contract that the mortgage should be given when requested by the creditor, although within four months of institution of proceedings in bankruptcy, is not a preference within the meaning of the bankrupt act. *Hewitt et al., Ass. etc., v. Northup et al.*, 16 N. B. R. 27.

29. A mortgage was executed by a bankrupt to his nieces eighteen days before the filing of a petition in bankruptcy, but in pursuance of a parol agreement between the bankrupt and the guardians of the infants made fifteen months before. *Held*, that such

agreement, based upon a valuable consideration, will be treated in equity as a mortgage. *Burdick, Ass. etc., v. Jackson et al.*, 15 N. B. R. 318.

30. The parties agreed with a guardian to execute a mortgage, and afterward executed a mortgage to the wards. *Held*, that such mortgage was a good execution of the former agreement, as the agreement inured to the benefit of the wards. *Id.*

31. A mortgage given in pursuance of a valid promise, made at the time of the advance, to give the specific security afterward executed will be sustained. In re Jackson Iron Mfg. Co., 15 N. B. R. 438; 2 Mich. Lawy. 435; 2 Cin. Law Bul. 154, 157; Fed. Cas. 7,153.

### IV. HOMESTEAD.

See EXEMPTIONS, 48, 69, 100; COSTS, 86.

32. A creditor whose proof shows that his debt is secured by a mortgage on the bankrupt's homestead is entitled to vote on his whole claim for the choice of assignee. In re Stillwell, 7 N. B. R. 226; 11 Amer. Law Reg. (N. S.) 706; Fed. Cas. 13,443.

33. A person may be summarily ordered to release a mortgage taken upon property claimed as a homestead after a decree declaring the premises not to be exempt. In re Boothroyd et al., 15 N. B. R. 368; Fed. Cas. 1,653; 2 Cin. Law Bul. 139.

34. A bankrupt is not entitled to the exemption of a homestead out of the lands mortgaged by him at the time of purchase to secure the unpaid purchase-money. In re Whitehead, 2 N. B. R. 180; 1 Chi. Leg. News, 326; Fed. Cas. 17,562.

### V. LIENS UNDER.

See LIEN, 3, 8, 105.

35. A certain bank holding a mortgage upon personalty of a bankrupt petitioned against the assignee, claiming a priority of lien. The evidence showed that the bankrupt was insolvent at the time he executed the mortgage. The petition was denied. *Merchants' Nat. Bank of Hastings v. Truax*, 1 N. B. R. 146; 1 Amer. Law T. Rep. Bankr. 73; Fed. Cas. 9,451.

36. Where a certain creditor claims a lien

by virtue of a judgment against the bankrupt recovered on November 5, 1866, but which was not recorded in the clerk's office until October 16, 1867, and the creditor holds a mortgage executed by the bankrupt, and recorded April 7, 1867, the mortgage lien has priority over the judgment. In re Lacy, 4 N. B. R. 15; 3 Amer. Law T. 215; 1 Amer. Law T. Rep. Bankr. 226; Fed. Cas. 7,970.

37. When a mortgagor is bound by the mortgage contract to keep the premises insured for the benefit of the mortgagee, and does keep them insured by a policy which contains no statement that the mortgagee has an interest therein, the mortgagee, nevertheless, has an equitable interest in or even a lien upon the proceeds of the policy. In re Sands Ale Brewing Co., 6 N. B. R. 101; 3 Biss. 175; 4 Chi. Leg. News, 187; 6 Amer. Law Rev. 574; Fed. Cas. 12,307.

38. An assignee sold the mortgaged property of a bankrupt without an order of court. *Held*, that the lien of the mortgagee was not divested. In re Cooper, 16 N. B. R. 178; Fed. Cas. 3,190.

39. A mortgagee of the real estate of a bankrupt, with condition broken before proceedings in bankruptcy, notified the marshal when he seized bark, wood and timber on the premises, and logs a short distance away, and grass and other crops unharvested, that he, the mortgagee, claimed the whole. The mortgagee's claim was sustained. In re Bruce, 16 N. B. R. 318; 9 Ben. 236; Fed. Cas. 2,045.

40. A mortgage to secure a debt and to secure the mortgagee as surety for the mortgagor constitutes a valid and subsisting lien upon the property mortgaged on the day of its record, for such amount as may be due on the debt and liabilities secured. *Milner, Jr. v. Meeks, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

41. A's property was sold under a mortgage for less than the amount of the mortgage. It was bid in by the mortgagee, who took judgment for the deficiency. A's assignee in bankruptcy redeemed the property by paying the amount for which it had been bid in, with interest, etc. *Held*, the judgment for the deficiency was not a lien on the property. *Lloyd, Ass., v. Hoo Lue et al.*, 17 N. B. R. 170; 5 Sawy. 74; 1 San Fran. Law J. 392; Fed. Cas. 8,432.

## VI. TRUSTEE'S RIGHTS.

See ESTATES, 42, II, (g), 269, 270.

42. An assignee simply succeeds to the rights the bankrupt had in property, and a suit may be maintained to correct a description in a mortgage given by the bankrupt. *Schulze, Ass. etc., v. Bolting*, 17 N. B. R. 167; 8 Biss. 174; Fed. Cas. 12,489.

43. Where a mortgage made by a railroad corporation provides that it shall include all property subsequently acquired by the mortgagor, it will include a railroad with its appurtenances subsequently leased by the mortgagor, and the title thereto will be valid as against the assignee of the mortgagor. *Barnard et al., Ass., v. Norwich & Worcester R. Co. et al.*, 14 N. B. R. 469; 4 Cliff. 351; 3 Cent. Law J. 603; 5 Amer. Law Rec. 361; 23 Int. Rev. Rec. 312; Fed. Cas. 1,007.

44. Unless the mortgagee of property to secure present or future advances is guilty of some fraud or preference, he may hold his security against the assignee, however insolvent the mortgagor may have been at the time the mortgage was given. *Ex parte Ames*, 7 N. B. R. 280; 1 Lowell, 561; Fed. Cas. 323.

45. A bankrupt had given a mortgage to secure A. against loss. A. sustained no loss, and the bankrupt later, and within four months before the commencement of proceedings against him, gave B. a second mortgage, and both mortgagees received money for the release of their mortgages. Recovery was had in a suit against B. *Held*, that the assignee was not estopped to maintain an action against A. *Sessions v. Johnson et al., Ass. etc.*, 17 N. B. R. 65; 95 U. S. 347.

46. A mortgagee can claim no rights under a mortgage given to secure him as indorser where he has paid nothing and is no longer liable, but he is liable to the assignee for moneys realized by him on the mortgage. *Id.*

47. The sale of a mortgage not due, by its owner, a manufacturing company wishing to realize money for the use of its business, is not "out of the usual and ordinary course of business." The sale is valid as against the assignee in bankruptcy. *Judson v. Kelyt*, 6 N. B. R. 165; 5 Ben. 348; Fed. Cas. 7,567.

48. Where the indorser of a note is secured by a mortgage, if the holder thereof prove

the note as unsecured, the mortgage is not thereby extinguished, the assignee being subrogated to the rights of the holder. *Hiscock, Ass. etc., v. Jaycox et al.*, 12 N. B. R. 507; Fed. Cas. 6,581.

49. The assignee must show something more than that debts were created, without notice of it, before it was recorded, in order to defeat a mortgage recorded before the bankruptcy proceedings were instituted. *Cragin v. Carmichael*, 11 N. B. R. 511; 2 Dill. 519; Fed. Cas. 8,319.

50. If a guardian transcends his power by making an agreement to discharge one mortgage and take a new one, such agreement is only voidable, and that only at the election of the ward on coming of age, and it is valid against the assignee of the mortgagor until so avoided. *Burdick, Ass. etc., v. Jackson et al.*, 15 N. B. R. 318.

51. Where an assignee filed a bill in equity to redeem certain real estate, a subsequent incumbrancer claimed the right to redeem and acquire complete title. *Held*, that he could not. *In re Longfellow et al.*, 17 N. B. R. 27; 2 Hask. 221; Fed. Cas. 8,486.

52. A petition in bankruptcy was filed against an insolvent more than two months after the making of a mortgage, but within two months of the filing of the same for record. The state registry law provided that the mortgage was not "good and effectual in law to hold such lands against any other person, but the grantor and his heirs only," without record. The assignee in bankruptcy brought an action to set aside the conveyance. *Held*, that the transfer was not complete until the instrument was recorded, and should be set aside as against the assignee. *Bostwick, Ass., v. Foster*, 18 N. B. R. 123; 14 Blatchf. 436; Fed. Cas. 1,682.

53. The assignee represents the whole body of creditors, and it is his duty to contest the validity of any mortgage by which one creditor obtains a preference. *In re Metzgar*, 2 N. B. R. 114; 1 Chi. Leg. News, 163; Fed. Cas. 9,510.

54. The assignee cannot impeach the validity of a mortgage which is void as against creditors on account of the omission to record it as required by the state laws. *In re Collins*, 12 N. B. R. 379; 12 Blatchf. 548; 1 N. Y. Wkly. Dig. 78; Fed. Cas. 8,007.

## VII. FORECLOSURE.

See COSTS, 41, 42; COURTS, II, (e), 6.

### (a) General.

55. A second mortgagee is not entitled, the first mortgagee consenting, to take and hold possession of the mortgaged property, to foreclose his mortgage as against an assignee in bankruptcy, nor to appropriate the rents and profits to the payment of his debt. *Hutchings et al. v. Muzzy Iron Works*, 8 N. B. R. 458; 6 Chi. Leg. News, 27; Fed. Cas. 6,952.

56. A bankrupt court may grant leave to a mortgagee to foreclose in the usual way, making the assignees parties, or to take upon itself the duty of ascertaining and liquidating the lien by a sale of the property mortgaged, and applying the proceeds in payment, and if the latter course is pursued is authorized to adjust the costs of the proceedings necessary to give effect to the specific lien. *In re Ellerhorst et al.*, 7 N. B. R. 49; 2 Sawy. 219; Fed. Cas. 4,380.

57. Where a creditor proving his debt in bankruptcy waives his right to sue it or to take a deficiency decree against the bankrupt on the foreclosure of a mortgage, and the bankrupt's discharge is granted, the right to such a decree is lost. *Scott v. Ellery*, 142 U. S. 381.

58. A mortgagee issued a *scire facias*, not against the assignee in bankruptcy, but against the bankrupt, and without notice to the assignee, and procured the bankrupt's acceptance of service and proceeded no further. On claim for commissions and costs stipulated to be paid on foreclosure, *held*, that the proceeding was a nullity and that costs should not be allowed. *In re Devore*, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

59. Costs and commissions stipulated to be paid on foreclosure of a mortgage will not be allowed when the proceedings to foreclose are invalid. *Id.*

60. If a mortgagee does not prove his debt, he may enforce his mortgage in a state court, although the assignee set the property apart as an exemption to the bankrupt mortgagor. *Hatcher v. Jones*, 14 N. B. R. 387.

61. It was sought by bill and affidavits on

the part of the assignee in bankruptcy to invalidate a mortgage by establishing usury in regard to it. The decree of foreclosure and the sale were made after the bankruptcy proceedings were commenced. It was held that the said decree of the state court was a bar to the right of the assignee to raise the question of usury. *Cutter, Ass. etc., v. Dingee*, 14 N. B. R. 294; 8 Ben. 469; Fed. Cas. 3,518.

62. A petition by a secured creditor for leave to foreclose a mortgage will be dismissed where no notice is shown to be given to the assignee, and no proof is made of the existence of a debt nor of its amount. In re *Frizelle*, 5 N. B. R. 122; Fed. Cas. 5,133.

63. Jurisdiction to foreclose mortgages is not included in the power to be exercised summarily by a bankrupt court, especially where the mortgagee claims adversely to the assignee and the title of the applicant is denied. In re *Casey*, 8 N. B. R. 71; 10 Blatchf. 376; Fed. Cas. 2,495.

64. A petition being filed to foreclose a mortgage, it was pleaded in bar that the defendant had been adjudged a bankrupt and that the mortgagee had been named in the schedule as a creditor, and that the land covered by the mortgage had been duly set apart as the bankrupt's exemption, no exception being taken by the mortgagee. A demurrer being filed to the plea, it was sustained, and on appeal the judgment was affirmed. *Cumming v. Clegg*, 14 N. B. R. 49.

65. The plaintiff claimed a lien on certain assets of the bankrupt in the hands of the assignee, consisting of rents of certain houses, by virtue of two mortgages. He foreclosed, and after sale, finding the proceeds greatly insufficient to pay the debt, applied to have the rents received by the assignee paid to him. *Held*, that where the assignee in bankruptcy receives rents of mortgaged property, it must be distributed among the general creditors, and if the mortgagee desires it to be applied specifically to his lien, he must not only show the insufficiency of the security without the rents and profits, but he must also intercept it before it reaches the assignee, as if the foreclosure is completed, he cannot intercept the rents after finding the sale insufficient. *Foster v. Estate of Rhodes*, 10 N. B. R. 523; Fed. Cas. 4,981.

66. When a mortgagee has proved up his

claim in the bankruptcy proceedings, he will be entitled to preference of payment out of the funds realized from the sale of the mortgaged property, and if any action to foreclose becomes necessary he should first obtain leave of the court. *Schulze, Ass. etc., v. Bolting*, 17 N. B. R. 167; 8 Biss. 174; Fed. Cas. 12,489.

67. A mortgage creditor, with leave of the court, foreclosed in a state court and proved his claim on a judgment for the deficiency. On re-examination, *held*, that he had no right to prove such claim, the sale in the state court not being the proper measure for ascertaining the value of his security. In re *Herreck et al.*, 17 N. B. R. 335; Fed. Cas. 6,421.

68. A bill was filed to foreclose a junior mortgage made expressly subject to two prior mortgages. The prior mortgagees were not made parties, and objection was made to the bill on that ground. The effort of the plaintiff was only to sell the equity of redemption, and there was no substantial doubt as to the amounts due the prior lienholders. *Held*, that the prior mortgagees were not necessary parties. *Jerome et al., Ass., v. McCarter*, 15 N. B. R. 546; 94 U. S. 734.

69. An assignee in bankruptcy brought an action to foreclose a mortgage given by K. to the bankrupts. K. pleaded as a set-off the amount due him from the bankrupts for personal services. *Held*, that K. could set off any demand in his favor which is the subject of the set-off. *Von Sachs, Ass. etc., v. Kretz et al.*, 19 N. B. R. 83.

### (b) *In State Court.*

#### (1) When Allowed.

70. A mortgagee may proceed to foreclose his mortgage in a state court, if the assignee does not seek to redeem the mortgaged property, and the proceeding to foreclose is not absolutely void. *Brown v. Gibbons*, 13 N. B. R. 407.

71. An assignee in bankruptcy sold land recovered by him as the bankrupt's property, and deeded the same to the purchaser and put him in possession. *Held*, those having liens on the land, not having been made parties to the proceedings in the bankrupt court, or proved their claims there, may afterward



foreclose their liens in the state court, making the bankrupt, his assignee and the purchaser parties defendant. *Adams v. Collier*, 123 U. S. 382.

72. The mortgagee may institute a proceeding in a state court to foreclose the mortgage, if the assignee takes no steps to redeem the mortgage property. *McKay v. Funk*, 13 N. B. R. 334.

73. The mere filing of a petition in involuntary bankruptcy does not divest the jurisdiction of a state court over an action to foreclose a mortgage. In *re Irving*, 14 N. B. R. 289; 8 Ben. 463; 2 N. Y. Wkly. Dig. 500; Fed. Cas. 7,073.

74. A bankrupt court does not acquire such exclusive jurisdiction over the bankrupt's property, from an adjudication in bankruptcy, as would prevent a decree of foreclosure on a bill filed before the adjudication. *Jerome et al., Ass., v. McCarter*, 15 N. B. R. 546; 94 U. S. 734.

75. The foreclosure of a mortgage and the sale of the mortgaged premises pending proceedings in bankruptcy, without proof of the mortgage debt, or leave of the court first obtained, are invalid; and such proceedings are in contempt of the jurisdiction and authority of the bankrupt court. *Phelps v. Sellick*, 8 N. B. R. 390; Fed. Cas. 11,079.

## (2) When Stayed or Enjoined.

76. Where an assignee appeared voluntarily in a state court in proceedings to foreclose a mortgage made by his bankrupt, instituted after the bankruptcy proceedings, *held*, that he could not, after sale made, obtain an injunction in the district court against further proceedings in the state court. *Augustine, Ass., v. McFarland*, 13 N. B. R. 7; 1 N. Y. Wkly. Dig. 318; Fed. Cas. 648.

77. In the absence of an injunction, a party is not liable for contempt for selling property under a decree of foreclosure entered before the adjudication of bankruptcy, or for entering up a judgment for the deficiency against the bankrupt. In *re Irving*, 14 N. B. R. 289; 8 Ben. 463; 2 N. Y. Wkly. Dig. 500; Fed. Cas. 7,073.

78. United States courts have exclusive jurisdiction over all questions and proceed-

ings relating to the estate of a bankrupt. Therefore, foreclosure proceedings brought in a state court to enforce a mortgage upon property of a person adjudicated a bankrupt are void unless brought with the consent of the bankrupt court. In *re Brinkman*, 7 N. B. R. 421; Fed. Cas. 1,884.

79. If a mortgagee institutes proceedings to foreclose a mortgage after the commencement of proceedings in bankruptcy, such proceedings may, on the application of the assignee, be stayed until the bankruptcy proceedings are closed. *Markson et al. v. Haney*, 12 N. B. R. 484.

80. A creditor holding a mortgage lien on certain real estate belonging to the bankrupt, without regard to the proceedings in bankruptcy, commenced independent proceedings in a state court to foreclose his mortgage. On petition of the assignee, *held*, that the mortgage creditor should be restrained from continuing the foreclosure suit. In *re Snedaker*, 8 N. B. R. 155.

81. On petition to restrain certain creditors from prosecuting a suit commenced by them in a state court to foreclose a mortgage held by them as security for a debt, *held*, that the district court had full jurisdiction to grant the relief asked. In *re Davis*, 8 N. B. R. 167; Fed. Cas. 3,619.

## VIII. SALES.

See SALES, 37, 83, 85, 86, 92, 121; CLAIMS, 126; COSTS, 43, 56.

### (a) General.

82. Where no just cause for questioning the validity of the mortgage exists, the court in bankruptcy will entertain the summary petition of a mortgagee for the sale of the premises. In *re Sacchi*, 6 N. B. R. 497; 10 Blatchf. 29; 4 Chi. Leg. News, 289; 43 How. Pr. 252; Fed. Cas. 12,200.

83. Creditors of a bankrupt, under the act of 1841, had a right to ask that mortgaged property be sold, and the assignee could contest their claim. *Ex parte City Bank of New Orleans*, 3 How. 292.

84. The supreme court cannot issue a writ of prohibition in such a case. *Id.*

85. If the holder of a mortgage asserts.

his lien and demands a new sale of the land, it will be subject to the rights of all parties as they stood before the bankruptcy sale, which, by reason of his absence and objections, were ineffectual to bar the incumbrance. *Factors, etc. Ins. Co. v. Murphy*, 111 U. S. 738.

86. A district court sitting in bankruptcy may direct the sale of property free from all incumbrances. The rights of a mortgagee who was not made a party to proceedings in the district court to sell the property are not affected by the proceedings. *Ray v. Brigham et al.*, 12 N. B. R. 145.

87. Pending a suit to foreclose a mortgage, creditors filed a petition against the mortgagor. On application to the bankrupt court leave was granted allowing the action of foreclosure to proceed to judgment and sale. The purchaser at such sale filed a motion to be relieved from the purchase. *Held*, that he was not entitled to be relieved, and that an assignee could not set such sale aside. *Lenihan v. Haman*, 8 N. B. R. 557.

88. A. executed a mortgage to B. and subsequently a second to C., shortly after which C. was adjudged a bankrupt and an assignee appointed, who took steps to foreclose C.'s mortgage, and had a decree and order of sale passed. During proceedings on the mortgage to C., B. instituted proceedings to foreclose the first mortgage, making C.'s assignee defendant. A subpoena was served on him and the bill was taken as confessed for want of appearance, five days after which C.'s assignee died. The premises were sold under a decree in favor of B. On a bill filed by a second assignee of C. to redeem, *held*, that the right of redemption was not affected by the sale under the foreclosure. *Avery, Ass. etc., v. Ryerson et al.*, 16 N. B. R. 289.

89. A mortgage with power of sale, and a deed made in execution of the power, vests a seisin and a conditional estate in the mortgagee, with a power superadded to convey an absolute estate by a sale pursuant to the terms of the power. *Hall v. Bliss et al.*, 14 N. B. R. 329.

90. The holder of a mortgage containing a power of sale may become a purchaser at a sale under the power, if the mortgage so provides. *Id.*

### (b) *Proceeds.*

See *CLAIMS*, 219.

91. A creditor who, knowing his debtor to be insolvent, takes as security for his debt a second mortgage on the debtor's personal property, is not entitled, upon the bankruptcy of the debtor, to have his debt paid out of the proceeds of the sale of the mortgaged goods in excess of the claim of the first mortgagee. *In re Palmer*, 8 N. B. R. 74; 2 Amer. Law T. 107; 1 Amer. Law T. Rep. Bankr. 139; Fed. Cas. 10,681.

92. A. mortgaged all his stock and fixtures to secure the mortgagee for all the liabilities he had assumed or might assume for A. Both became bankrupt, and the holders of the notes of A., indorsed by the mortgagee, proved against both estates. *Held*, that the proceeds of the sale of the mortgaged property should be divided *pro rata* among all the creditors of the mortgagor. *Ex parte Morris*, *In re Foye*, 16 N. B. R. 572; 2 Lowell, 424; Fed. Cas. 9,823.

93. In New York, where there is no leviable interest in a mortgagor's equity of redemption and where a petition in bankruptcy has been filed before a sale under the mortgage, an execution creditor has no lien on the surplus proceeds of sale left after satisfying the mortgage. *In re Wrisley et al.*, 17 N. B. R. 259; Fed. Cas. 18,103.

94. If a creditor has a mortgage or pledge for his debt, he may apply to the court to have the same sold and the proceeds thereof applied towards the payment of his debt *pro tanto*, and if the debt is not fully satisfied out of the security he may prove for the residue. *In re Stewart*, 1 N. B. R. 42; 1 Amer. Law T. Rep. Bankr. 16; 15 Pittsb. Leg. J. 222; Fed. Cas. 13,418.

95. When a mortgagor is bound by the mortgage to keep the premises insured for the benefit of the mortgagee, and does in fact keep them insured by a policy which contains no statement that the mortgagee has an interest therein, the mortgagee, nevertheless, has an equitable interest in the proceeds of the policy. *In re Sands Brew. Co.*, 6 N. B. R. 101; 3 Biss. 175; 4 Chi. Leg. News, 137; 6 Amer. Law Rev. 574; Fed. Cas. 12,307.

(c) *Deficiency.*

93. Property mortgaged by a bankrupt failed to bring at a sale a sufficient sum to defray the expenses of the trust and sale, and to pay the entire amount due by virtue of the mortgage. *Held*, that such deficiency could not be made up out of the general fund in the hands of the assignee. *In re Purcell et al.*, 2 N. B. R. 10; 2 Ben. 485; 86 How. Pr. 42; Fed. Cas. 11,469.

97. In an action to foreclose a mortgage a receiver of the rents and profits of the real estate was appointed after the mortgagor filed his petition in bankruptcy, but before adjudication. A sale of the premises did not yield sufficient to pay the mortgage debt, and the mortgagee moved that the rents be paid to him in reduction of the deficiency, but the assignee claimed the money. *Held*, that the mortgagee was entitled to the rents. *Hayes v. Dickinson*, 15 N. B. R. 350.

98. Where a mortgagee fails to secure an equitable lien by bill and the appointment of a receiver of products or rents of the mortgaged premises after a default, and the premises sell for less than his claims, at a sale by the mortgagor's assignee in bankruptcy, he will only be entitled to a *pro rata* share on the deficiency of his claim out of the bankrupt's assets. Products of the mortgaged premises reduced to possession by the mortgagor's assignee in bankruptcy prior to sale of the mortgaged premises are to be treated as assets to be distributed under the bankrupt act, and the mortgagee cannot claim that a deficiency, after sale on his mortgage, shall be paid in preference to the claims of other creditors. *In re Snedaker*, 4 N. B. R. 43.

## IX. EXCHANGE OF SECURITIES.

See BANKS, 26.

99. Within four months preceding bankruptcy, a lessor of a hotel holding as security for rent chattel mortgages, good between the parties but void as to creditors, released the same upon receiving real estate in payment of the rent. *Held*, that the transaction, being an exchange of securities in good faith, was valid. *Stewart v. Platt, Ass. etc.*, 19 N. B. R. 847; 101 U. S. 731.

100. A mortgage or other conveyance made as security for a debt evidenced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. *In re Wynne*, 4 N. B. R. 5; Chase, 237; 9 Amer. Law Reg. (N. S.) 627; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

101. A first mortgage ceases to have any validity or effect on the substitution of a second mortgage, which not only changes the evidence of the debt, but the security itself. *In re Jordan*, 9 N. B. R. 416; Fed. Cas. 7,529.

102. A debtor who gives a mortgage, which correctly describes the note which it is given to secure, in lieu of an unrecorded mortgage incorrectly describing the note, the correct instrument being recorded, does not illegally prefer the mortgagee. *Player, Ass. v. Lippincott et al.*, 16 N. B. R. 208; 4 Dill. 125, note; 5 Cent. Law J. 260; Fed. Cas. 11,224.

103. Where a security by way of mortgage is given more than four months before bankruptcy, a change in the substance of the deeds made within four months of the bankruptcy will be protected if no greater value were put into the creditor's hands. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

## X. DEEDS OF TRUST.

See ACTS OF BANKRUPTCY, 58; CORPORATIONS, 55.

104. A deed of trust executed to secure a note given to the trustee of the maker's wife, in consideration of the proceeds of the wife's separate property received and used by the husband in his business, is fraudulent and void as to existing creditors at the time the deed was executed. *Gillespie v. McKnight et al.*, 3 N. B. R. 117; Fed. Cas. 5,495.

105. Where the trustees under a deed of trust, executed by a bankrupt and duly delivered and recorded, take no steps to acquire possession and carry out the trust after the condition on which the trust was to be executed comes into operation, but allow the bankrupt to retain possession, the court will not order such deed to be set aside and delivered up to be canceled, where no fraud is

shown. In re Broome, 3 N. B. R. 90; 3 Ben. 488; Fed. Cas. 1,966.

106. If a deed of trust is actually delivered to the trustee, with power to record it when he deems proper, it is valid as against the assignee, although it is not recorded until after the grantor's failure. National Bank of Fredericksburg v. Conway et al., 14 N. B. R. 518; 1 Hughes, 37; Fed. Cas. 10,087.

107. A deed of trust executed and delivered more than four months prior to filing a petition in bankruptcy, though not acknowledged and recorded until within that period, if valid by the laws of the state where made, cannot be avoided by the assignee in bankruptcy of the grantor; it is otherwise where the laws of the state make recording essential to its validity. Seaver v. Spink, 8 N. B. R. 218.

## XI. CHATTEL.

See PARTNERS, 109.

### (a) General.

108. A chattel mortgage of machinery and other things which would be trade fixtures as between landlord and tenant will give the mortgagee a valid lien as against the assignee in bankruptcy, although as against a prior mortgagee of the realty the fixtures would be real estate, if it appears that said prior mortgagee makes no claim to the fixtures. Ex parte Ames, 7 N. B. R. 230; 1 Lowell, 581; Fed. Cas. 323.

109. A chattel mortgage was good in part in New York and in part in New Jersey. It was held valid in New York but not in New Jersey, and a reference was ordered to show what part was in New York and what part in New Jersey. In re Soldiers' B. M. & D. Co., 2 N. B. R. 163; 3 Ben. 204; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 18,163.

110. A chattel mortgage or bill of sale, void as against creditors under the state statute of frauds, conveys no title as against the assignee in bankruptcy. Edmonson v. Hyde, 7 N. B. R. 1; 2 Sawy. 205; 5 Amer. Law T. Rep. (U. S. Cts.) 380; Fed. Cas. 4,285.

111. A few days previous to filing a petition A. gave to B., under advice of counsel, a chattel mortgage to secure him for a note he had indorsed, and after filing the peti-

tion he sold him goods to more than the amount of the note, the mortgage being canceled at the time of the sale, and the value of the goods was afterwards paid by B. to A.'s assignee. Petition for discharge denied. In re Finn, 8 N. B. R. 525; Fed. Cas. 4,795.

112. A chattel mortgage may be set aside by an assignee though made more than four months prior to the commencement of proceedings in bankruptcy. Seaver v. Spink, 8 N. B. R. 218.

113. An entry of a chattel mortgage or a promissory note in a trader's blotter is a sufficient record in a bankrupt's books of account. In re Winsor, 16 N. B. R. 152; 9 Chi. Leg. News, 402; 2 Cin. Law Bul. 212; Fed. Cas. 17,885.

114. A chattel mortgage "of all the goods and merchandise" in a store does not include fixtures. In re Eldridge, 4 N. B. R. 162; 2 Biss. 362; 8 Chi. Leg. News, 177; Fed. Cas. 4,830.

115. A chattel mortgage is a disposition of property out of the ordinary course of business. United States v. Bayer, 13 N. B. R. 88; Fed. Cas. 14,548.

116. Where a subsequent and prior mortgage do not cover the same goods, the former is liable to be set aside as a preference as to all goods not included in the latter. Brett v. Carter, 14 N. B. R. 301; 2 Lowell, 458; 2 N. Y. Wkly. Dig. 331; 22 Int. Rev. Rec. 152; 3 Cent. Law J. 286; 13 Alb. Law J. 361; 10 Amer. Law Rev. 600; Fed. Cas. 1,844.

117. A mortgage was executed within four months of bankruptcy, but in accordance with a resolution of several months before authorizing security generally for money to be borrowed. Held, that the resolution was too indefinite, and that the mortgage was invalid. In re The Jackson Iron Mfg. Co., 15 N. B. R. 438; 2 Mich. Lawy. 435; 2 Cin. Law Bul. 154; Fed. Cas. 7,153.

### (b) Where Mortgagor Retains Possession.

See CONVEYANCES, 4.

118. A bankrupt executed a chattel mortgage, and the parties agreed that mortgagor should continue dealing in the mortgaged property and use the proceeds in his business,

paying to the mortgagees such sums as he could spare from his general business. *Held*, that such agreement invalidated the mortgage. *Southard, Ass. etc., v. Benner et al.*, 19 N. B. R. 124.

119. Where a debtor executes to his creditor a chattel mortgage of nearly all his property to secure an extension of time on debts past due, and after default the mortgagee takes possession and sells the property, the assignee in bankruptcy of the mortgagor is entitled to recover from the mortgagee the value of the property, such mortgage being void, as a preference. *In re Driggs, Ass., v. Moore et al.*, 3 N. B. R. 149; 1 Abb. U. S. 440; Fed. Cas. 4,083.

120. A. in good faith took a mortgage on goods sold to B. to secure the purchase-money. B. was to sell the goods at retail and apply the proceeds on the mortgage. B. sold part of the goods but failed to account to A. for them, and, on B.'s going into voluntary bankruptcy, it was held that the proceeds of the goods remaining unsold should go to A., and that A. should be allowed to prove his claim against B.'s estate as an unsecured creditor for the amount of the goods sold and misappropriated on A.'s surrendering the mortgage. *Overman, Ass. etc., v. Quick, Adm'r, etc.*, 17 N. B. R. 235; 8 Biss. 134; 10 Chi. Leg. News, 210; Fed. Cas. 10,624.

121. A mortgage of the stock and fixtures which remain in the possession of the mortgagor and are sold and replaced by others is illegal and void. *Smith, Ass., v. Ely et al.*, 10 N. B. R. 553; Fed. Cas. 13,044.

122. A chattel mortgage is not invalidated by the mere fact that the mortgagee permits the mortgagor to sell and dispose of the mortgaged chattels as his own. A chattel mortgage may be valid as to certain chattels described in it, and voidable as to others. *Barron et al. v. Morris, Ass.*, 14 N. B. R. 371; Fed. Cas. 1,055.

123. A mortgage of goods which the mortgagor is allowed to retain and traffic with as his own is void as to creditors or the mortgagor's assignee in bankruptcy. *In re Morrill*, 8 N. B. R. 117; 2 Sawy. 356; Fed. Cas. 2,821.

124. A. executed a chattel mortgage to B. of his stock in trade, as security for his note, retaining possession of the same until the commencement of proceedings in bank-

ruptcy against him. *Held*, that B. had no title to the goods as against the other creditors of A. *In re Manly*, 3 N. B. R. 75; 2 Bond, 261; 2 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 9,031.

125. Where a mortgagee in a chattel mortgage properly filed sells the property to a third person, the mortgage providing for such sale, the burden of proof does not rest with the purchaser to show that the chattel mortgage to his vendor was executed in good faith and was not to defraud creditors, even though the mortgagee does not take possession of the property at the time the mortgage is executed. *Marsh et al., Ex'rs, v. Armstrong, etc.*, 11 N. B. R. 125.

126. Where the mortgagor remained in possession of his stock of goods, the property mortgaged, and continued with the consent of the mortgagee to make sales therefrom, the mortgage does not constitute a lien. *Second Nat. Bank v. Hunt*, 4 N. B. R. 198; 11 Wall. 391.

127. A mortgage upon a stock of goods, authorizing the mortgagor to sell and replace them in such manner as he may determine, and use the proceeds as he sees fit, is void as to such goods as the power of sale relates to. *In re Kahley*, 4 N. B. R. 124; 3 Chi. Leg. News, 85; 2 Leg. Gaz. 405; 2 Biss. 883; Fed. Cas. 7,593.

128. A chattel mortgage of a stock of goods, which permits the mortgagor to dispose of the goods in due course of trade, is fraudulent as to other creditors, and is void as to them, without reference to the good faith of the mortgage debt, or the intentions of the mortgagor as to fraud. *In re Foster*, 18 N. B. R. 64; 10 Chi. Leg. News, 315; Fed. Cas. 4,964.

129. A mortgage of chattels, where the mortgagor is permitted to sell the goods in the usual course of trade, is not void *per se*. *Brett v. Carter*, 14 N. B. R. 301; 2 Lowell, 458; 2 N. Y. Wkly. Dig. 331; 22 Int. Rev. Rec. 152; 3 Cent. Law J. 286; 13 Alb. Law J. 361; 10 Amer. Law Rev. 600; Fed. Cas. 1,844.

### (c) *On After-acquired Goods.*

See CONVEYANCES, 4.

130. A mortgage on a stock of goods is void which undertakes to be a lien on all new goods brought into the store, and to re-

lease from its effect all goods sold in the regular course of business by the mortgagor. *In re Bloom*, 17 N. B. R. 425; 17 Alb. Law J. 434; 24 Int. Rev. Rec. 166; 35 Leg. Int. 165; Fed. Cas. 1,557.

131. A mortgage of after-acquired chattels is valid under the law of Massachusetts. *Brett v. Carter*, 14 N. B. R. 301; 2 Lowell, 458; 2 N. Y. Wkly. Dig. 331; 22 Int. Rev. Rec. 152; 8 Cent. Law J. 286; 18 Alb. Law J. 361; 10 Amer. Law Rev. 600; Fed. Cas. 1,844.

132. The taking of a mortgage which expressly covers after-acquired goods, and keeping it from the records for the purpose of enabling the mortgagor to obtain more credit thereby, is a fraud on the creditors so deceived, and is void as against them. *In re Stephens*, 6 N. B. R. 533; 8 Biss. 187; Fed. Cas. 13,365.

133. A chattel mortgage was executed by a debtor in favor of his creditor. Afterward the debtor indorsed on the back of the mortgage an agreement that it should cover property acquired after the execution of the mortgage. It appeared that the indorsement was procured for the purpose of delaying creditors. *Held*, that the indorsement was void, but did not deprive the mortgagees of their rights under the mortgage. *Whithead et al. v. Pillsbury et al.*, Ass., 18 N. B. R. 241; Fed. Cas. 17,572.

#### (d) *To Secure Future Advances.*

134. A bankrupt had given a mortgage before the commencement of proceedings in bankruptcy to secure a debt and future advances of goods. *Held*, to be a valid mortgage. *Schulze, Ass. etc., v. Bolting*, 17 N. B. R. 167; 8 Biss. 174; Fed. Cas. 12,489.

135. A mortgage executed in good faith to secure future sales of goods to the mortgagor is good as against an assignee in bankruptcy to the extent of advances actually made. *Marvin, Ass., v. Chambers*, 13 N. B. R. 77; 12 Blatchf. 495; 1 N. Y. Wkly. Dig. 365; Fed. Cas. 9,179.

#### (e) *Recording.*

136. A chattel mortgage given for a present consideration, and good between the parties, is not rendered invalid as against the

assignee by failure to file the same, or take possession of the property, until a month before the commencement of proceedings in bankruptcy, notwithstanding the mortgagee knew the mortgagor to be insolvent, and that the instrument gave him a preference. *In re Barman et al.*, 14 N. B. R. 125; 3 N. Y. Wkly. Dig. 111; Fed. Cas. 999.

137. A chattel trust must be recorded to give it effect where the mortgagor resides; the mortgage of the stock in hand is void unless accompanied by immediate delivery; the taking possession by the mortgagee before bankruptcy proceedings commences does not help the case. *Kane, Ass., v. Rice*, 10 N. B. R. 469; Fed. Cas. 7,609.

138. A debtor gave a chattel mortgage which the creditor neglected to record until twenty-five days before the debtor became insolvent. *Held*, that the mortgage was void as against the assignee in bankruptcy. *Harvey, Ass., v. Crane*, 5 N. B. R. 218; 2 Biss. 496; 3 Chi. Leg. News, 341; Fed. Cas. 6,178.

139. A brewer executed a chattel mortgage to a creditor covering all chattels in his brewery. The mortgage was acknowledged and filed, and subsequently refiled. In August, 1874, the mortgagee took possession of the property and sold it. In December following the brewer was adjudicated a bankrupt and the assignee sued the mortgagee to recover the value of the mortgaged property. *Held*, that he could not recover, as the mortgagee took possession before proceedings in bankruptcy were commenced, even though the mortgage was not properly recorded. *Miller, Ass., v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,576.

140. A party who afterwards became a bankrupt, in return for a loan executed a bill of sale of certain property to the lender, but took back a writing in the nature of a lease. There was no change of possession and the instruments were not recorded. *Held*, that the transaction amounted to a mortgage and was invalid as against creditors. *In re Gurney*, 15 N. B. R. 373; 7 Biss. 414; 9 Chi. Leg. News, 255; 4 Law & Eq. Rep. 28; Fed. Cas. 5,873.

141. A executed a chattel mortgage to B. to secure him for notes on which he was liable as indorser for A. The deed was not recorded as required by law, and was re-

tained by B. at the time of A.'s bankruptcy. *Held*, that as between A.'s assignee and B. the mortgage was valid. *In re Griffiths*, 8 N. B. R. 179.

142. An unregistered personal mortgage is not valid in the state of Kansas as against creditors. *Second Nat. Bank v. Hunt*, 4 N. B. R. 198; 11 Wall. 391.

143. A mortgage executed in a state having no statute of record, or where a record is not required as between the parties, will not be defeated by the act of 1867, in relation to record. *In re Dow*, 6 N. B. R. 10; Fed. Cas. 4,036.

144. A firm executed a chattel mortgage upon the firm property, and the same was filed in the town where the firm conducted business. *Held*, that under the New York statute said mortgage was void as against creditors, subsequent purchasers and mortgagees in good faith, unless filed in the towns or cities where the individual members of the firm reside, but is good between the parties. *Stewart v. Platt, Ass. etc.*, 19 N. B. R. 347; 101 U. S. 731.

145. A mortgage of goods and chattels situate partly in New York and partly in New Jersey, and recorded only in the first-named state, is valid as against creditors of the mortgagor as to that portion of the property situate in New York, and void as to that portion situate in New Jersey. *In re Soldiers' Bus. Mess. & Des. Co.*, 2 N. B. R. 162; 3 Ben. 204; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 13,163.

## XII. IN GENERAL.

See AMENDMENT, 40; DISCHARGE, 310; ESTATES, II, (g).

146. A defendant conveyed to the plaintiff, covenanting that the premises were free from all incumbrances, when in fact they were subject to a mortgage, which the plaintiff had to pay. In an action on the covenant the defendant pleaded a discharge by composition. *Held*, that the plaintiff was not entitled to recover. *Wells v. Lamprey*, 16 N. B. R. 205.

147. The taking possession of property by a mortgagee and omission to sell within a reasonable time operates as a satisfaction of the debt to the extent of the value of the

property at the time the mortgagee took possession. *In re Haake*, 7 N. B. R. 61; 2 Sawy. 231; Fed. Cas. 5,883.

148. When a mortgage is given to indemnify the mortgagee for his advances, and he lends his acceptance to the mortgagor, and, after the bankruptcy of the latter, buys up the paper at a discount, he can charge against the mortgaged property only what he has paid in cash to take up his acceptances. *Ex parte Ames*, 7 N. B. R. 230; 1 Lowell, 561; Fed. Cas. 323.

149. Advances made in good faith while a mortgage is being prepared, and as part of the money agreed to be secured by it, will be protected, though there should be a change of the debtor's circumstances after the money was advanced and before the deed was delivered. *Id.*

150. To entitle a mortgagee to have a receiver appointed it must appear that the mortgaged premises are an inadequate security for the debt and that the mortgagor or other party personally liable for the debt is insolvent. The inadequacy must be clearly made out. *Burlingame, Ass. etc., v. Parce et al.*, 17 N. B. R. 246.

151. The remedy of a creditor of a bankrupt claiming property by virtue of an earlier unrecorded mortgage is by bill in equity and not by petition. *Barstow v. Peckham*, 5 N. B. R. 72; Fed. Cas. 1,064.

152. It is not necessary that an agreement to extend the time of payment of a debt which is secured by a mortgage or deed of trust on real estate should be in writing. *In re Betts*, 15 N. B. R. 536; 4 Dill. 93; 7 Rep. 522; 4 Cent. Law J. 558; 24 Pittsb. Leg. J. 195; Fed. Cas. 1,371.

153. A bankrupt who has collected money belonging to the estate will not be permitted to pay it for interest on mortgages, unless it appear that such payment is for the benefit of the estate. *In re Ettinger*, 18 N. B. R. 223; Fed. Cas. 4,548.

154. Where under the state law a mortgage which simply allows the mortgagor to retain possession and use of the property mortgaged is *prima facie* valid when duly recorded, such registration is intended as a substitute for delivery of possession, and is not meant as a protection for all other stipulations contained in the mortgage, and can-

not be used as a cover for any fraudulent transaction. *Robinson et al. v. Elliott, Ass.*, 11 N. B. R. 554; 23 Wall. 513.

155. A. executed a mortgage to B, the condition being that the former should, within nine months, pay all the notes on which the latter was liable as indorser, and any and all notes given for A.'s accommodation on which B. might be liable "during the pendency of the deed." B. still retained the mortgage when A. was adjudicated bankrupt. *Held*, that the mortgage was security for notes outstanding at that time. *In re Griffiths*, 3 N. B. R. 179.

156. Where real estate is covered by a mortgage, the inchoate right of dower attaches to the equity of redemption only. *Hiscock, Ass. etc., v. Jaycox & Green*, 12 N. B. R. 507; *Fed. Cas.* 6,531.

157. A recovery of the possession by the mortgagee from the mortgagor, or one holding under him, in ejectment, carries with it only the right to recover mesne profits from the time of notice by the mortgagee to quit, or, in the absence of such notice or its equivalent, from the time of the commencement of the action of ejectment. *In re Bennett*, 12 N. B. R. 257; 2 *Hughes*, 156; *Fed. Cas.* 1,813.

158. Where an attaching creditor under the provisions of the state law pays off a mortgage, upon the dissolution of the attachment by bankruptcy he will be entitled to repayment out of the proceeds, resulting from the sale of the property, in the hands of the assignee. *Whithed et al. v. Pillsbury et al., Ass.*, 13 N. B. R. 241; *Fed. Cas.* 17,572.

159. A mortgagee having a valid claim against the property of the bankrupt, by petition to the bankrupt court asked an order that the assignee make a sale of simply his right of redemption. The petition was dismissed. *Ferguson v. Peckham*, 6 N. B. R. 569; 29 *Leg. Int.* 285; 6 *Alb. Law J.* 291; *Fed. Cas.* 4,741.

160. A mortgage is a conveyance, within the meaning of sections 14 and 39 of the act of 1867. *Bingham v. Frost*, 6 N. B. R. 180; *Fed. Cas.* 1,418.

#### MUTUAL ACCOUNTS.

See SET-OFF.

#### NATIONAL BANKS.

See BANKS.

#### NECESSARIES.

See EXEMPTIONS, V.

#### NEGLIGENCE.

1. A railroad corporation is not liable for an injury caused by the negligence of a special receiver or assignee while operating the road. *Metz, Adm'r, v. Buffalo, Corry & Pittsburgh R. R. Co.*, 12 N. B. R. 559.

2. A purchaser is not liable for an injury caused by the negligence of the assignee after the sale and before the confirmation thereof, *Id.*

#### NEGOTIABLE PAPER.

See COMMERCIAL PAPER.

#### NEW PROMISE.

See DISCHARGE, XIX; LIMITATIONS, STATUTE OF, IV.

#### NEW TRIAL.

See APPEALS AND WRITS OF ERROR; COURTS, I, (b); PLEADING AND PRACTICE; REHEARING AND REVIEW.

A debtor denied the alleged acts of bankruptcy and demanded a jury trial, and upon such trial the jury found the facts alleged in the petition were untrue. *Held*, the district court has the same power over verdicts in such cases as courts of common law, and may set them aside and order a new trial. *In re Forest*, 9 N. B. R. 278.

#### NEWSPAPERS.

See NOTICE, 2, 4, 6, 57, VIII.

#### NON COMPOS MENTIS.

See INSANITY.



**NON-RESIDENT CREDITOR.**

See PLACE OF BUSINESS.

**NONSUIT.**

See PLEADING AND PRACTICE, 59.

1. When a motion for a nonsuit is denied the court's action is not reviewable in error. *Miller, Ass., v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,578.

2. Where a discharge is pleaded the court cannot dismiss the cause on that ground, but must submit the issue to a jury. *Austin v. Markham*, 10 N. B. R. 548.

3. The fact that the plaintiff has been adjudged a bankrupt since the suit was begun is not a ground for nonsuit. *Wooddall v. Austin et al.*, 10 N. B. R. 545.

**NOTARY PUBLIC.**

I. IN GENERAL.

II. POWER TO TAKE ACKNOWLEDGMENTS.

III. SEAL.

See POWER OF ATTORNEY, 4, 14.

## I. IN GENERAL.

See COSTS AND FEES, 183.

1. A court of bankruptcy is *sui generis* in its nature, and its practice is controlled by the laws creating it; and notaries have not the judicial power to take proof of claims. They are state officers, and a creditor residing in another judicial district cannot make proof of claim before them (act of 1867). In *re Strauss*, 2 N. B. R. 18; Fed. Cas. 13,532.

## II. POWER TO TAKE ACKNOWLEDGMENTS.

See DEEDS, 6.

2. A notary has the authority to take acknowledgments of letters of attorney. In *re McDuffee*, 14 N. B. R. 336; 2 Hask. 76; 9 Chi. Leg. News, 40; Fed. Cas. 8,778.

3. An acknowledgment before a grantee named in a deed is of no effect. *National Bank of Fredericksburg v. Conway et al.*, 14 N. B. R. 518; 1 Hughes, 37; Fed. Cas. 10,037.

4. A notary is competent to acknowledge and certify a deed of trust, although he is interested as one of the beneficiaries in the trust. *Id.*

## III. SEAL.

5. A notary before whom proof of debt is made must authenticate the same by his official seal as well as his signature, and a seal used in common with others will not answer. In *re Nebe*, 11 N. B. R. 289; Fed. Cas. 10,073.

6. A creditor proved his claim before a notary public, who subscribed the jurat with his name, the words "notary public," and the county and state. On the paper containing his certificate was impressed a seal containing the words "notarial seal," and the county and state, there being in the center of the seal a device impressed in the paper. The proof of the claim was allowed. In *re Phillips*, 14 N. B. R. 219; 8 Chi. Leg. News, 409; 22 Int. Rev. Rec. 306; Fed. Cas. 11,098.

7. The requisites of a notarial seal are determined by the law of the locality from which the official derives his authority. In the absence of express legislation it need not contain the name of the official. It is the seal and not its composition or character of words and devices which raises the presumption of official character of which the courts take judicial notice. The presumption is that it is the official seal of the person it purports to be and who subscribes the jurat. *Id.*

**NOTICE.**

I. CREDITOR.

(a) *General.*(b) *Trustee (Assignee).*

II. FRAUD.

III. CONVEYANCE.

IV. INSOLVENCY.

V. PARTNERS.

VI. AGENT.

VII. DISCHARGE.

VIII. PUBLICATION.

IX. IN GENERAL.

See INJUNCTION, 57; LEASE, 3; PETITIONS, 158; PLEADING AND PRACTICE, 65; PREFERENCES, 49, 161, 183; SALES, 115; TRUST, 9; WAIVER, III.

## I. CREDITOR.

(a) *General.*

See CLAIMS, 216; COURTS, 98.

1. Where a merchant suffers a judgment by default, this fact is at least sufficient to put the creditor on inquiry as to the debtor's solvency, and he must be held chargeable with the knowledge thus obtained. A preference obtained under such circumstances must be surrendered before the claim is provable. *In re Forsyth v. Murtha*, 7 N. B. R. 174; Fed. Cas. 4,948.

2. A failure to publish in one of the newspapers designated notice of the first meeting of creditors to prove their debts and choose an assignee renders all subsequent proceedings void. *In re Hall*, 2 N. B. R. 68; 16 Pittsb. Leg. J. 52; Fed. Cas. 5,922.

3. A notice to creditors which does not specify the names of the several creditors, and the amounts respectively admitted to be due each creditor, is defective. *In re Jones*, 2 N. B. R. 20; Fed. Cas. 7,447.

4. Where the return of a marshal shows that there was due publication of notices, but no proof of notice served by mail or personally, a new warrant must be issued. *In re Schepeler, S. & R. et al.*, 8 N. B. R. 42; 8 Ben. 846; Fed. Cas. 12,452.

5. A conveyance was made by an insolvent debtor to one of his creditors. In determining the knowledge of the preferred creditor as to the insolvency, *held*, that the creditor need not have absolute knowledge of the fact, but only reasonable cause to believe; that is, that such a state of facts had been brought to his notice as would have led prudent business men to conclude that he could not meet his obligations as they matured in the course of business. *Toof v. Martin*, 6 N. B. R. 49; 13 Wall. 40.

6. General publication is all the notice to creditors contemplated by section 11 of the act of 1867. *Thornton v. Hogan*, 17 N. B. R. 277.

7. A clerical mistake in the name of a creditor made by an officer prevented him from receiving a special notice required by section 11 of the act of 1867. *Held*, the proceedings bound such creditor. *Id.*

8. The proof by affidavit of the giving of

the regular notice through the mail to all creditors named in the schedule will, ordinarily, be held conclusive of the regularity of the notice. *In re Spencer*, 18 N. B. R. 199; Fed. Cas. 13,229.

9. A party fairly put upon inquiry, when the means of knowledge are at hand, if he omits to inquire, does so at his peril, and he is chargeable with a knowledge of all the facts which by a proper inquiry he might have ascertained. *Hamlin, Ass., v. Pettibone*, 10 N. B. R. 173; 6 Biss. 167; 10 Alb. Law J. 141; 20 Int. Rev. Rec. 73; 1 Cent. Law J. 404; 31 Leg. Int. 293; Fed. Cas. 5,995.

10. Where a creditor, to whom a preference has been given, may by the slightest inquiry be apprised of his debtor's real condition, he is chargeable with a knowledge of the facts as they exist. *Lloyd, Ass. etc., v. Strobridge*, 16 N. B. R. 197; 10 Chi. Leg. News, 1; 1 San Fran. Law J. 13; Fed. Cas. 8,435.

11. A debtor who, at the execution of an instrument to secure a creditor, requested to be allowed to secure other creditors in the same instrument, gives notice of the existence of other creditors and of the debtor's inability to meet their demands. *Id.*

(b) *Trustee (Assignee).*

See MORTGAGES, 138; CLAIMS, 35.

12. A claim which has been rejected by the assignee and returned to the register for further proof should not be ordered paid, without notice to the assignee, and an opportunity given to answer the creditor's petition. *In re Mitteldorfer & Co.*, 3 N. B. R. 9; Chase, 276; Fed. Cas. 9,674.

13. In proceedings before the register the general creditors had not been notified to be present, but their assignee was present. *Held*, they were not entitled to notice. *In re Campbell*, 17 N. B. R. 4; 8 Hughes, 276; Fed. Cas. 2,348.

14. It is the duty of the assignee to appear before the register without notice where the proceedings before the register have been instigated by him. Where he was present it does not lie in his mouth to say he was not summoned. *Id.*

15. The assignee waives the want of notice before the bringing of the suit if he appears and pleads. *Rowe v. Page*, 13 N. B. R. 366.

16. It is not necessary to give notice to the creditors of the taxation of marshal's fees; notice to the assignee is sufficient. In re Rein, 13 N. B. R. 551; 8 Ben. 384; Fed. Cas. 11,678.

## II. FRAUD.

See FRAUD, 74

17. The purchasers from a first vendor must, to invalidate their title, be affected by notice of, or participation in, the original fraud; that is, must have been purchasers without valuable consideration or *mala fide*. Babbitt v. Walbrun & Co., 6 N. B. R. 359; Fed. Cas. 695.

18. Upon suit by the assignee in a bankruptcy court to set aside conveyances by the bankrupt as fraudulent, M., one of the defendants, claimed a reimbursement for improvements and moneys advanced to reduce incumbrances. Held, that having purchased the property with notice of the fraud his claim would not be allowed. In re Mead, 19 N. B. R. 81; 2 N. J. Law J. 26; Fed. Cas. 9,365.

19. A purchaser with notice, who acquires his title from a purchaser, where the former acquired the property by fraud, takes no better title than his vendor had. Harrell v. Beall, Ass., 9 N. B. R. 49; 17 Wall. 590.

## III. CONVEYANCE.

20. If a mortgagor conveys in fraud of the bankrupt act, actual notice must be brought home to the mortgagee who has taken the conveyance under circumstances promising relief to the debtor and apparently for that purpose. Boothe, Ass. etc., v. Brooks et al., 12 N. B. R. 898; 1 N. Y. Wkly. Dig. 125; Fed. Cas. 1,650.

21. Title to land was claimed by the plaintiff, as part of the assets of a bankrupt, sold to the plaintiff's grantor. The defendants claimed title under a quitclaim deed executed by the bankrupt, and contended that they had no actual notice of the plaintiff's title, as the deed of the register to the assignee had not been duly acknowledged and recorded. Judgment was for the plaintiff, and was affirmed on appeal. Brady v. Otis et al., 14 N. B. R. 345.

22. In order to render a conveyance made by a bankrupt within four months of the fil-

ing of a petition with a view to give a preference, or other conveyance made within six months, void, it is necessary that the person taking the conveyance should know that it was made in fraud of the act, and to prevent the property from coming to the assignee, or from being distributed under the act. Campbell, Ass., v. Waite et al., 16 N. B. R. 93; 9 Ben. 166; Fed. Cas. 2,374.

23. A stipulation in a sale of personal property reserving title in the vendor is, in the absence of fraud, valid against purchasers of the vendee for value and without notice. In re Binford, 17 N. B. R. 353; 3 Hughes, 295; Fed. Cas. 1,411.

24. A purchaser for valuable consideration can prevail upon the title purchased, although he had notice at the time of purchase of facts which, if known to the vendor, would defeat the title. Johnson, Ass., v. Rogers et al., 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

25. Notice to a creditor of an act of bankruptcy does not affect a transfer to him, otherwise than as it tends to show that he had reason to believe that such transfer was made in fraud of the bankrupt act. Catlin v. Hoffman, 9 N. B. R. 342; 2 Sawy. 436; 21 Pittsb. Leg. J. 159; Fed. Cas. 2,521.

26. After the filing of a petition in bankruptcy and an injunction on the alleged bankrupt he sold certain notes to a party who purchased in good faith. Held, that the filing of the petition was notice to all. The notes were ordered to be delivered to the assignee. In re Lake, 6 N. B. R. 542; 6 West. Jur. 360; 4 Chi. Leg. News, 281; Fed. Cas. 7,992.

## IV. INSOLVENCY.

See ATTORNEYS, 22; ASSIGNMENT, 8.

27. A corporation that is unable to pay its debts as they become due in the course of its daily transactions is insolvent, and a creditor may be said to have reasonable cause to believe in the existence of such insolvency when such a state of facts is brought to his notice, respecting the pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that the debtor was unable to meet his obligations as they matured. Buchanan et al. v. Smith, 7 N. B. R. 513; 16 Wall. 277.

28. Creditors issuing executions on judgments obtained upon demands long overdue against a bankrupt who has been pressed in repeated instances to pay or secure the demands, and has failed to do so, must be held to have had reasonable cause to believe that their debtor was insolvent. *Id.*

29. A state court may entertain an action brought by an assignee to recover money received as a preference. The consent of the debtor to revive a judgment so as to continue the lien thereof does not affect the creditor with knowledge of insolvency which he had no reasonable cause to believe from other facts, and does not constitute a preference. *Kemmerer v. Tool*, 12 N. B. R. 334.

30. Assignees in bankruptcy brought a bill against a creditor alleging that on execution he had sold the property, thereby obtaining a preference, having reasonable cause to believe the bankrupts insolvent. *Held*, that as before the filing of the petition the bankrupts were compromising their debts, the creditor had no reasonable cause to believe he was obtaining a preference. *Warren et al., Ass. v. Tenth Nat. Bank et al.*, 5 N. B. R. 479; 5 Ben. 395; 42 How. Pr. 169; *Fed. Cas.* 17,200.

31. Where it appears that the debtor who gives a preference to a creditor was insolvent and that the means of knowledge were at hand, and that such facts were known to the creditor securing the preference as clearly ought to have put him upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent. Under such circumstances ordinary prudence is required of a creditor, and if he fails to investigate he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Buchanan et al. v. Smith*, 7 N. B. R. 513; 16 Wall. 277.

32. Actual knowledge of insolvency, as regards a transfer within four months of an application in bankruptcy, is not necessary, but the inquiry is whether as business men, acting with ordinary prudence, the mortgagees, etc., would have reasonable cause to believe that the debtors were insolvent. *Scammon, Ass. v. Cole et al.*, 5 N. B. R. 257; 3 Cliff. 472; *Fed. Cas.* 12,432.

33. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when put upon inquiry he is chargeable with all the knowledge he would have acquired had he performed his duty. *Id.*

34. A creditor holding the paper of his debtor, in respect to which the debtor has committed an act of bankruptcy by suffering it to remain unpaid for more than two months after maturity, must be held to know that the debtor is insolvent and has committed an act of bankruptcy, if such creditor, instead of putting the debtor into bankruptcy, proceeds to take measures to secure a preference over other creditors. *Warren v. Tenth Nat. Bank et al.*, 7 N. B. R. 481; 10 Blatchf. 493; *Fed. Cas.* 17,202.

35. A knowledge of facts and circumstances which would put a prudent man upon inquiry is a reasonable cause to believe a debtor insolvent. *Webb, Ass. v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; *Fed. Cas.* 17,325.

36. Where repeated demands for payment are met by promises to pay a debt at specified times, which are not kept, and where a creditor knows that the debtor has other debts greater in amount than his own, he will be presumed to know that the debtor is insolvent, if in fact he is. *In re Armstrong*, 16 N. B. R. 275; 9 Ben. 212; *Fed. Cas.* 539.

37. A creditor has reasonable cause to believe that his debtor is insolvent when such a state of facts is brought to his notice respecting the pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations in the ordinary course of his business. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 331; 94 U. S. 553.

38. A debtor was insolvent and the creditor might have ascertained the fact by reasonable inquiry. It did not appear that the creditor made any inquiries as to his pecuniary standing except from one other creditor. In an action to recover securities transferred by the bankrupt to the creditor to secure his debt, *held*, that the creditor had reason to believe that the debtor was insolvent. *Id.*

39. A banker who receives security for the payment of a draft which he cashed on the preceding day has reasonable cause to

believe that the drawer is insolvent. *Merchants' Nat. Bank v. Cook et al., Trustees*, 16 N. B. R. 391; 95 U. S. 342.

40. A plaintiff purchased notes of the defendant with knowledge of the failure of the latter, the same being bought between the date of suspension and the filing of the petition in bankruptcy. *Held*, that the plaintiff had constructive knowledge of such suspension of payment. *Hunt v. Holmes et al.*, 16 N. B. R. 101; Fed. Cas. 6,890.

## V. PARTNERS.

See PARTNERS, 27, 44, 110, 168.

41. Where a petition is filed to have a firm declared bankrupt, if all the members of the firm do not assent to the petition notice of its filing must be given to such of the members as do not assent to it, in like manner as if the proceedings were on an involuntary bankruptcy against the members of the firm. Until then the register has not authority to make an adjudication of the bankruptcy of the firm. *In re Lewis*, 1 N. B. R. 19; 2 Ben. 96; Fed. Cas. 8,311.

42. A firm which indorses a note given by a member, which falls due after the firm's bankruptcy, need not have notice of the dishonor of such note, in order to prove it against the firm assets. *Ex parte Russell, In re Paul & Son*, 16 N. B. R. 476; Fed. Cas. 12,148.

43. The obtaining for the firm of an adjudication by one member of a firm without giving notice to the other member is void under rule 18 (act of 1867). *In re Temple*, 17 N. B. R. 845; 4 Sawy. 92; Fed. Cas. 13,825.

## VI. AGENT.

44. In contemplation of law, a corporation is held to know what is known by its chief officer. *Loudon, Ass. v. The First Nat. Bank, etc.*, 15 N. B. R. 476; 2 Hughes, 420; Fed. Cas. 8,525.

45. The attorneys of a judgment creditor knew of the bankrupt's insolvency and his intent to evade the bankrupt law. *Held*, that such knowledge was the knowledge of the creditor. *Rogers, Ass. etc., v. Palmer*, 19 N. B. R. 471; 102 U. S. 263.

46. Where an agent knows that a debtor is insolvent, and that a transaction per-

formed on account of his principal with such debtor is in fraud of the bankrupt law, it is the same as if the principal had participated in the fraud. *Sage, Jr. v. Wynkoop, Ass.*, 16 N. B. R. 363; Fed. Cas. 12,215.

## VII. DISCHARGE.

See DISCHARGE, 96, 101, 104, 105, 211; COLLATERAL ATTACK, 8.

47. An action of debt was brought against one who pleaded a discharge in bankruptcy, to which the plaintiff demurred that the schedule incorrectly gave his address and that he had no notice of the proceedings. Notice prior to the discharge had, however, been given. *Demurrer overruled. Pattison & Co. v. Wilbur*, 12 N. B. R. 193.

48. Where a discharge has been annulled on account of fraud, the decree annulling such discharge will not be vacated without notice to all parties affected. *In re Augenstein*, 16 N. B. R. 252.

49. It is not necessary, to give jurisdiction to the bankrupt court, that the creditors have actual notice, and the lack of it will not make the discharge invalid if it is found that the requirements of the act were honestly complied with by the bankrupt. *Rayl, Adm'r, v. Lapham*, 15 N. B. R. 508.

50. A debtor who obtains a discharge pending an action on his promissory note which he omits from his schedule, the plaintiff having no notice of proceedings in bankruptcy, cannot plead the discharge so obtained in bar. *Batchelder v. Low*, 8 N. B. R. 571.

51. Notices of settlement of a register's charges and the finishing of a bankrupt's examination may be included in the notice for the bankrupt's discharge. If the business of the meeting is not finished before the register, weekly continuances are entered so that the notices remain in force, and the time for entering opposition is enlarged for ten days beyond the time of the next weekly session. *In re Sherwood*, 1 N. B. R. 74; 25 Leg. Int. 76; 1 Amer. Law T. Rep. Bankr. 47; 6 Phila. 461; Fed. Cas. 12,774.

52. F., a bankrupt, applied for a discharge, but the proof of debt had been lost. The register proposed a general notice of meeting under a petition for a discharge of all cred-

itors named in the schedule, stating that if they had filed proofs of debt it would be necessary for them to resupply it, as it had been lost. *Held*, that such notice was insufficient. In re Friedlob, 19 N. B. R. 122; 11 Chi. Leg. News, 189; Fed. Cas. 5,118.

### VIII. PUBLICATION.

53. Under the statute it is imperative that notice shall be given for three consecutive weeks, in a newspaper or newspapers designated by the judge, of all public sales, whether the assignee or other officer proceeds under the power given him by the statute or under a special order of the court (act of 1867). In re Hunter, 18 N. B. R. 504; Fed. Cas. 6,903.

54. Notice of sale by the assignee shall be published in newspapers which may be chosen by the register. In re Burke and McKee, 15 N. B. R. 40; Fed. Cas. 2,157.

55. Notice of dissolution of partnership was published on January 11th, 21st and 27th, and on February 1st and 10th, each of these dates being in separate weeks. *Held*, that the statute requiring publication "once in each week for four weeks" was not complied with, as an interval of seven days between each publication should intervene. In re King et al., 7 N. B. R. 279; 5 Ben. 453; Fed. Cas. 7,779.

### IX. IN GENERAL.

See COMMERCIAL PAPER, 82, XIV, (a); COURTS, I, (c), 2; ESTATES, 202.

56. The bankrupt has an interest in the proceedings which may result in his final discharge, hence he is entitled to notice of an application for annulling the adjudication in bankruptcy. In re Bush, 6 N. B. R. 179; 6 West. Jur. 274; Fed. Cas. 2,222.

57. Omission to publish notice of the first meeting in one of papers designated is sufficient irregularity to set aside the proceedings. In re Hall, 1 N. B. R. 60.

58. A bankrupt was adjudicated in June, 1878. A creditor petitioned to vacate the adjudication in March, 1879. *Held*, that she was put on inquiry by notice of the adjudication, and that the failure to make inquiries was evidence of acquiescence. In re Meade, 19 N. B. R. 335; Fed. Cas. 9,370.

59. A debtor was adjudged a bankrupt, and had a valuable interest in realty, which he omitted from his schedule, he claiming that the interest was not recoverable. The assignee *pro hac vice* petitioned for leave to sell the claim at public or private sale, and on the same day an order was made authorizing the sale, which was also on the same day, made privately, without notice. It was held that the order was void and the sale a nullity. Ex parte Bryan, Ass., In re Major, 14 N. B. R. 71; 2 Hughes, 273; 23 Pittsb. Leg. J. 196; Fed. Cas. 2,061.

60. Notice of an application to set aside a composition was sent to the debtor, but not to the other creditors. *Held*, that all creditors were entitled to notice. Ex parte Hamlin, 16 N. B. R. 320; 2 Lowell, 571; 5 Cent. Law J. 281; Fed. Cas. 5,993.

61. In section 35 of the act of 1867, as amended, the word "knowledge" means actual knowledge, but actual knowledge may be presumed from the circumstances of the case. In re Hauck & Co., 17 N. B. R. 158; Fed. Cas. 6,219.

62. It is not necessary to give notice to bankrupts of the time and place of the examination of witnesses, and the same can be proceeded with without reference to examination by creditors. In re Levy et al., 1 N. B. R. 66; 2 Ben. 169; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 8,297.

63. After schedules are amended by adding new creditors, a new warrant should issue to be served on the creditors whose names have been added. In re Perry, 1 N. B. R. 2; 1 Amer. Law T. Rep. Bankr. 4; Fed. Cas. 10,998.

64. A bankruptcy court cannot authorize the compounding of a claim without notice to creditors, except upon testimony and petition setting forth facts. In re Hoole, 19 N. B. R. 477; Fed. Cas. 6,673.

### OATH.

See DISCHARGE, 193; PROOF OF CLAIMS, 22.

1. The oath of allegiance annexed to the petition of the debtor may be taken before a register (1867). In re Walker, 1 N. B. R. 67; Fed. Cas. 17,062.

2. The form of oath prescribed for proving

debts in bankruptcy need not be followed in voting upon resolutions for composition. In *re Morris*, 12 N. B. R. 170.

3. A bankrupt petitioned for his discharge, and asked that the final oath be administered, etc., which was objected to by creditors who had claimed the allowance of ten days within which to file specifications. *Held*, that the oath should be administered (1867). In *re Pulver*, 2 N. B. R. 101; 3 Ben. 65; 1 Chi. Leg. News, 139; Fed. Cas. 11,467.

4. After a bankrupt has made the oath required in section 29 of the act (1867), specifications in opposition to his discharge were filed and subsequently withdrawn. *Held*, that the oath must be made after such withdrawal. In *re Machad*, 2 N. B. R. 113; 3 Ben. 131; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 8,819.

### OMISSIONS.

See SCHEDULES, VII.

### OPERATIVES.

See CLAIMS, 81; INFANTS; WAGES.

1. Payment of wages to employees, in contemplation of insolvency, is an act of bankruptcy. The preferred wages of an employee must be secured through the proceedings in bankruptcy. In *re Kenyon & Fenton*, 6 N. B. R. 238.

2. Wages paid servants after the passage of the act of 1867, as necessary family expenses, cannot be allowed where an objection to discharge is made. In *re Rosenfield*, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; 8 Amer. Law Reg. (N. S.) 44; Fed. Cas. 12,057.

3. Where an employee is thrown out of employment by the bankruptcy of his employer and has been paid for the time he actually worked, he is not entitled to priority in payment for the time during which he was unable to find other employment. In *re Pevear et al.*, 17 N. B. R. 461; Fed. Cas. 11,053.

4. When the assets are undoubtedly sufficient to pay workmen to the extent of fifty dollars each, they can only vote on the question whether a resolution of composition shall be adopted or not, to the extent of their

respective debts above fifty dollars (act of 1867). In *re O'Neil*, 14 N. B. R. 210; 2 Lowell, 470; Fed. Cas. 10,528.

5. Where there are privileged debts due workmen, the assignee has no right to waste their money in litigation for the supposed benefit of the general creditors. In *re Sawyer*, 16 N. B. R. 460; 2 Lowell, 551; 15 Alb. Law J. 280; Fed. Cas. 12,396.

6. A bankrupt, being unable to pay workmen for their labor rendered within six months prior to adjudication, settled with them and they assigned their settled accounts to B., who presented the assigned claims for proof and demanded the rights of priority allowed workmen's claims by the bankrupt act. *Held*, that the claims should be allowed. In *re Brown*, 3 N. B. R. 177; 4 Ben. 142; Fed. Cas. 1,974.

### ORDERS.

See RULES.

### PARTIES.

See ATTACHMENT; DISCHARGE; ESTATES; INTERVENTION; MORTGAGES; PETITIONS; PLEADING AND PRACTICE.

### PARTNERS.

#### I. WHO ARE

#### II. NATURE AND FORM OF PROCEEDING.

#### III. ADJUDICATIONS.

##### (a) *Of Firm.*

##### (b) *Of Individuals.*

#### IV. COMPOSITION.

#### V. DISCHARGE.

#### VI. EXEMPTIONS.

#### VII. ASSETS.

##### (a) *General.*

##### (b) *Distribution.*

#### VIII. CONVEYANCES AND TRANSFERS.

##### (a) *To Partners.*

##### (b) *To Strangers.*

#### IX. TRUSTEES.

##### (a) *Of Firm.*

##### (b) *Of Individual Member.*

#### X. JURISDICTION OF COURTS.

# **XI. DISSOLUTION.**

- (a) *What is.*
- (b) *Effect of.*

# **XII. CLAIMS.**

- (a) *Of Firm Creditors.*
  - 1. Against Firm Assets.
  - 2. Against Separate Assets.
  - 3. General.
- (b) *Of Individual Creditors.*
- (c) *Between Joint and Separate Estates.*
- (d) *Partner Against Partner.*
- (e) *Between Firms.*

# **XIII. GENERAL.**

See EVIDENCE, 114; FRAUD, 48; JUDGMENT, IX; LACHES, 7; LIEN, 78, 79, 126; MARSHALING ASSETS, 1, 5, 6; PLEADING AND PRACTICE, 118; PREFERENCE, 194, 222; SET-OFF, 18; STAY OF PROCEEDINGS, 24; STOCKHOLDERS, 29; SURETY, 11; UNITED STATES, 4.

## **I. WHO ARE.**

1. Acting under a written agreement, A. advanced to a firm a sum of money, and in consideration for certain clerical services was to receive one-sixth of the net profits of the business. Afterwards, by verbal agreement, he was to receive one-fourth of the profits, but not less than \$25 per month, profits or no profits. The firm were declared bankrupts, and on petition filed against A., *held*, that participation in the profits is presumptive evidence of partnership, and in view of all the circumstances and the actions of A. he should be regarded, as to third parties, as a partner. In *re Francis et al.*, 7 N. B. R. 359; 2 Sawy. 286; 5 Pac. Law Rep. 213; 4 Leg. Op. 493; 7 Alb. Law J. 13; Fed. Cas. 5,031.

2. Two firms shared in a certain venture and kept an account at the bank in the name of one, adding the word "Co.," and so signed the checks. *Held*, that these checks did not establish a copartnership between the two firms, and that the holder of one of the checks thus signed could not file a petition in bankruptcy against the members of both firms. In *re Warner et al.*, 7 N. B. R. 47; 4 Pac. Law Rep. 123; Fed. Cas. 17,178.

3. The wife of a bankrupt purchased with her own money a share in a firm by which

her husband was employed as manager, receiving a share of profits in lieu of salary, the profits of which were derived from the skill, diligence and services of the members, the wife rendering no service, but participating in the profits, her share of which, together with that of the bankrupt, did not exceed a fair remuneration for his services. *Held*, that the bankrupt was virtually a partner, and there was a wilful concealment of the assets of his estate. In *re Rathbone*, 2 N. B. R. 89; 3 Ben. 50; 1 Amer. Law T. Rep. Bankr. 114; 1 Chi. Leg. News, 107; Fed. Cas. 11,581.

4. B. and C. advanced money to purchase a stock of merchandise, the business to be carried on by A. and in his name, B. and C. having the option, by agreement, to share in the profits, if the business was a success; if not, then to receive back the amount advanced, with interest. On A.'s bankruptcy, it appearing that B. and C. had never elected to share in the profits, *held*, there was no partnership within the meaning of the bankrupt act, and that B. and C. were not liable as such, but that they would be liable in an action at law. *Moore et al. v. Walton et al.*, 9 N. B. R. 402; Fed. Cas. 9,773.

5. For the purposes of petitioning, a partnership is to be held to exist so long as there are outstanding debts against the firm or assets undistributed belonging to it. *Hunt, Tillinghast & Co. v. Pooke & Steere*, 5 N. B. R. 161; Fed. Cas. 6,896.

6. A. was B.'s agent for the manufacture of iron. B. was to own the iron, which was to be sold, and the proceeds, after paying B. certain sums, divided between A., B. and C. C. sold the iron with the knowledge of B. and failed to turn over to A. the money due him. *Held*, that the agency under this contract was more of a partnership than an agency, and the relations of A. and B. were not of the fiduciary relation comprehended by section 33 of the act of 1867. *Baker v. Sterling, Jr.*, 17 N. B. R. 218.

7. An agreement between A. and B. that A. shall receive, and B. shall pay, a salary to be measured by the net profits received, does not create a partnership, the distinction being between a salary measured by the profits, and a share of the profits as a partner. In *re Pierson*, 10 N. B. R. 107; Fed. Cas. 11,153.

8. When a man and his wife hold them-



selves out to the world as partners in trade, it will be presumed, in the absence of proof, that he contributed her share of the capital, and that her time, skill and savings went into the business. In *re Kinkead*, 7 N. B. R. 439; 3 Biss. 405; 7 West. Jur. 110; 6 Amer. Law T. Rep. 45; 5 Chi. Leg. News, 217; 1 Amer. Law Rec. 533; 3 Bench & Bar (U. S.), 41; Fed. Cas. 7,824.

9. Creditors opposing the discharge of a bankrupt claimed that the bankrupt and one S. were partners. A contract existed between the bankrupt and S. which provided that the debtor should conduct a butchering business for S. as his agent and salesman; that the "offal, feet and commission on hides and the usual slaughter-house perquisites" should go to S., and the bankrupt, in lieu of wages, should receive what he could make above the current price of cattle bought after deducting expenses. The bankrupt was to account to S. daily and pay to him all money received until S. was fully reimbursed for stock and expenses. *Held*, there was no partnership. In *re Blumenthal*, 18 N. B. R. 555; Fed. Cas. 1,575.

10. A. held B. out as a partner, of which fact B. had notice, and procured credit on the strength of this supposed relation. *Held*, that B. was liable as a partner, and that neither community of interest nor participation in profits was necessary to such liability. In *re Jewett et al.*, 15 N. B. R. 126; 7 Biss. 328; Fed. Cas. 7,306.

11. The liability of a partner arises from pledging his name, if his name is introduced into the firm, thereby holding it out as a security to the community, or from receiving profits if he is a secret partner. In *re Munn*, 7 N. B. R. 468; 8 Biss. 442; 7 Amer. Law Rev. 751; Fed. Cas. 9,925.

12. The partnership between A. and B. was dissolved by A., who assigned all his interest in the partnership to C. *Held*, that B. was not a copartner with A., and could not maintain a petition under section 36 of the act of 1867 as to him. In *re Hartough et al.*, 3 N. B. R. 107; Fed. Cas. 6,164.

13. The failure of the directors of a corporation to comply with the requirements of the law will not subject the stockholders to the liability of copartners, and creditors have not the same rights and remedies which they

have against any ordinary copartnership or against individuals. *James, Adm'r, v. The Atlantic D. Co. et al.*, 11 N. B. R. 390; Fed. Cas. 7,179.

14. Where certain persons associate themselves together, assuming to be a corporation and using a corporate name, without authority of law, they are individually liable as copartners for the debts of the association; and a creditor who has dealt with them as a corporation is not thereby estopped from setting up his claim against them individually. In *re Mendenhall*, 9 N. B. R. 497; Fed. Cas. 9,425.

15. Where the existence of an alleged partnership is the subject of inquiry, the declarations of the alleged partner are not competent evidence. *Nudd et al. v. Burrows, Ass.*, 13 N. B. R. 289; 91 U. S. 426.

## II. NATURE AND FORM OF PROCEEDING.

16. A proceeding in bankruptcy instituted by one against his copartner is not an involuntary or compulsory proceeding. In *re Wilson*, 13 N. B. R. 253; 2 Lowell, 453; Fed. Cas. 17,784.

17. A proceeding by the petition of all the copartners is a purely voluntary petition. In *re Penn et al.*, 5 N. B. R. 30; 5 Ben. 89; 3 Chi. Leg. News, 225; Fed. Cas. 10,927.

18. A proceeding by the petition of a creditor of the copartners is a purely involuntary proceeding under section 39 (act of 1867), and requires the adjudication to proceed on the commission of some act of bankruptcy specified in that section. *Id.*

19. Where one or more of several partners file their petition in bankruptcy, in which other members refuse to join, the parties refusing may be proceeded against as involuntary bankrupts, and the order to show cause may be served on them outside of the territorial jurisdiction of the court, by a person duly authorized by the solicitor for the petitioner. *Stuart, Ass., v. Hines et al.*, 6 N. B. R. 416.

20. Except in the matter of expense it is of no consequence whether there are two proceedings or only one by or against partners, for the rights of creditors and others are the same. In *re Morse*, 13 N. B. R. 376; Fed. Cas. 9,854.

21. If a firm is insolvent and there has been a joint act of bankruptcy, the creditors may proceed against both, but the solvent partner would have an opportunity to clear himself by paying all the debts. He cannot safely pay them to his insolvent partner. In *re Bennett et al.*, 13 N. B. R. 181; 2 Lowell, 400; Fed. Cas. 1,814.

22. As long as there are unpaid partnership debts, the proceedings in bankruptcy may be joint. In *re Williams*, 8 N. B. R. 74; 1 Lowell, 406; Fed. Cas. 17,703.

23. A petition by one partner against another is *quasi in invitum*, and the objecting partner may show that the firm is not insolvent, though, if the creditors intervened, the court might require security to be given for the payment of the joint debts before dismissing the petition. In *re Fowler*, 1 N. B. R. 680 (8 vo. ed.).

### III. ADJUDICATIONS.

See PETITIONS, I, (c), II, (c); ACTS OF BANKRUPTCY, 33, 76, 81; ALLEN, 1; AMENDMENT, I, (b).

#### (a) Of Firm.

See NOTICE, 41; PETITIONS, 126.

24. Parties may be adjudged bankrupt as partners in a firm with others, though they have already been declared bankrupt as partners in another firm. In *re Jewett et al.*, 15 N. B. R. 126; 7 Biss. 928; Fed. Cas. 7,306.

25. B. and C. were members of the firm A., B. & C., and also of the firm B., C. & D. A decree of bankruptcy had been rendered against them as members of the former firm. *Held*, that such decree did not bar a petition against them as members of the latter firm. In *re Jewett & Co.*, 16 N. B. R. 48; 7 Biss. 473; 4 N. Y. Wkly. Dig. 494; 9 Chi. Leg. News, 345; 4 Law & Eq. Rep. 77; 23 Int. Rev. Rec. 232; Fed. Cas. 7,307.

26. An adjudication of bankruptcy of a firm and the members in whose name the firm did business, in a bankruptcy proceeding affecting them alone, to which a special partner was not a party, does not estop a partnership creditor from setting up the liability of such special partner imposed upon him by the statute for not complying with its provisions. *Abendroth v. Van Dolsen*, 131 U. S. 66.

27. The obtaining for the firm of an adjudication by one member without giving notice to the other member is void under rule 18 (act of 1867). In *re Temple*, 17 N. B. R. 345; 4 Sawy. 92; Fed. Cas. 13,825.

28. A firm may be adjudicated bankrupt so long as there are undisputed partnership assets and partnership liabilities. In *re Gorham*, 18 N. B. R. 419; 9 Biss. 23; 11 Chi. Leg. News, 58; 26 Pittsb. Leg. J. 112; Fed. Cas. 5,634.

29. A register, upon a petition in bankruptcy filed by a debtor individually, and as a copartner in a firm, adjudged said debtor individually and the firm bankrupt. The action regarding the firm was held erroneous. In *re Lewis*, 1 N. B. R. 19; 2 Ben. 96; Fed. Cas. 8,811.

30. On a voluntary petition for the adjudication of a firm the court has jurisdiction to determine the question of who constitute the firm, and an adjudication is valid, based upon the determination of such fact, until set aside or reversed. In *re Griffith et al.*, 18 N. B. R. 510; 26 Pittsb. Leg. J. 140; Fed. Cas. 5,820.

31. A partnership between a man and his wife can be adjudged bankrupt, and the wife may also individually be adjudged bankrupt. In *re Kinkead*, 7 N. B. R. 439; 8 Biss. 405; 7 West. Jur. 110; 6 Amer. Law T. Rep. 45; 5 Chi. Leg. News, 217; 1 Amer. Law Rec. 533; 8 Bench & Bar (U. S.), 41; Fed. Cas. 7,634.

32. A firm may be declared bankrupt although one of its members may have already been adjudicated to a creditor's petition. *Hunt, Tillinghast & Co. v. Pooke & Steere*, 5 N. B. R. 161; Fed. Cas. 6,896.

33. The decease of one partner prior to any adjudication upon the question of bankruptcy is not legal cause for dismissing the petition. *Id.*

34. Where, upon the death of one member of a copartnership, an administrator has been appointed, and the assets of the firm are in the custody of the probate court, the bankrupt court will not grant a rule to show cause why the firm should not be put into bankruptcy; but this will not preclude a separate creditor of one of the copartners from proceeding against him individually. In *re Daggett*, 8 N. B. R. 433; Fed. Cas. 3,536.

35. Where a certificate is filed under the New York statute, stating that a special partner had contributed a certain sum in cash

and a certain amount in goods, all the partners can be adjudged bankrupts as general partners. In *re Merrill et al.*, 13 N. B. R. 91; 12 Blatchf. 221; 1 N. Y. Wkly. Dig. 364; Fed. Cas. 9,467.

36. A firm cannot be adjudicated bankrupt in an involuntary proceeding to which one of the members of the firm is not made a party. In *re Pitt et al.*, 14 N. B. R. 59; 8 Ben. 389; 28 Pittsb. Leg. J. 196; Fed. Cas. 11,188.

37. A partner instituted proceedings for the purpose of vexing and harassing his copartner. *Held*, that the proceeding should be dismissed. In *re Hamlin et al.*, 16 N. B. R. 522; 8 Biss. 122; 10 Chi. Leg. News, 181; Fed. Cas. 5,904.

38. A bankrupt may amend his petition after adjudication so as to bring in his copartner in order to obtain a discharge of copartnership as well as individual debts. In *re Little*, 1 N. B. R. 74; 2 Ben. 186; 15 Pittsb. Leg. J. 268; Fed. Cas. 8,390.

39. The refusal of one partner to join in voluntary proceedings instituted by the other partners may well deprive the one refusing from all benefit of the composition; but, unless the refusal or neglect to join is the result of some fraud on the part of the partners who do carry on the proceeding, it is no reason for avoiding those proceedings as to them. In *re Henry et al.*, 17 N. B. R. 463; 9 Ben. 449; Fed. Cas. 6,370.

40. A member of a firm agreed for a stipulated price to allow, and caused the other members of the firm to allow, an adjudication in bankruptcy against the firm. *Held*, that his agreement was valid and for valuable consideration. *Sanford v. Huxford et al.*, 17 N. B. R. 385.

### (b) *Of Individuals.*

41. Individual partners, if insolvent, may be adjudged bankrupt, even though the partnership is solvent and in good credit. *Amsink et al. v. Bean, Ass.*, 11 N. B. R. 495; 22 Wall. 395.

42. A fraudulent misappropriation of the partnership funds by one partner entitles his copartner to institute proceedings and prove his claim against the wrong-doer the same as if no partnership had existed. In *re*

*Sigsby v. Willis*, 3 N. B. R. 51; 3 Ben. 371; 1 Amer. Law T. Rep. Bankr. 171; 2 Amer. Law T. 169; Fed. Cas. 12,349.

43. Where, after dissolution of a copartnership, there has been no settlement, one member is not entitled to an adjudication of bankruptcy against his former partner on account of claims for money or assets which had come into his hands over and above his share, or on account of obligations entered into during the continuance of the partnership, for which both are jointly liable. *Id.*

44. A. & B. and A. & C., two firms, made general assignments in fraud of creditors. B. died, and A. filed a petition in voluntary bankruptcy as an individual and as a partner in both firms. C. had no notice of the proceedings. *Held*, the proceedings as to the firm assets of A. & C. were void, as was also the general assignment. In *re Temple*, 17 N. B. R. 345; 4 Sawy. 92; Fed. Cas. 13,825.

45. Two members of a copartnership filed a petition praying that themselves and another member of the firm be adjudged bankrupts. The partnership had been dissolved, but had no assets that would pass to an assignee in bankruptcy. *Held*, that the petition should be dismissed as to the partner who did not join therein. In *re Crockett et al.*, 2 N. B. R. 75; 2 Ben. 514; 2 Amer. Law T. Rep. Bankr. 21; Fed. Cas. 3,402.

46. Personal service on one member of a firm out of the jurisdiction of the court in which the proceedings are pending is not a sufficient service to give the court jurisdiction to adjudicate against the party so served. *Isett v. Stuart*, 16 N. B. R. 191.

47. A secret partner whose firm has committed an act of bankruptcy may be adjudged a bankrupt although individually entirely solvent. In *re Ess et al.*, 7 N. B. R. 133; 3 Biss. 301; 4 Chi. Leg. News, 357; 20 Pittsb. Leg. J. 34; 2 Md. Law Rep. 353; 1 Amer. Law Rec. 356; 6 Alb. Law J. 277; 6 West. Jur. 447; Fed. Cas. 4,530.

48. A. and B. petitioned to be adjudged bankrupts as partners, and that C. might be included, he having been a partner with A. and having undertaken to pay the debts of A. and B. *Held*, all proceedings as to C. must be dismissed. In *re Wallace et al.*, 12 N. B. R. 191; Fed. Cas. 17,095.

49. Proceedings in involuntary bank-

ruptcy were instituted against one who was a partner in several different firms. The question arose as to whether firm debts were to be included in computing the number of creditors and amount of debts necessary to be represented by the petition, and the court held that both individual and firm debts must be computed (act of 1867). In re Lloyd, 15 N. B. R. 257; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429; 5 Amer. Law Rec. 679.

#### IV. COMPOSITION.

50. A firm secured a composition with consent of all its creditors, and a new firm was to be organized and new capital employed. No new capital was employed as agreed; but new debts were created. A petition prayed that the composition be set aside, but the court held the composition must stand. In re Ewing et al., 17 N. B. R. 109; Fed. Cas. 4,598.

51. Where the law governing special partnerships had not been complied with, but all the members of the firm thought A. was a special partner, but he did not join in the voluntary proceedings and his partnership interest was named as part of the liabilities, held that, while A. could not vote as a creditor, the proceedings in composition were not otherwise fatally irregular. In re Henry et al., 17 N. B. R. 463; 9 Ben. 449; Fed. Cas. 6,370.

52. A partner will not be allowed to have a composition set aside and his firm put into bankruptcy by setting up his own fraud in effecting the composition. In re Hamlin et al., 16 N. B. R. 523; 8 Biss. 122; 10 Chi. Leg. News, 131; Fed. Cas. 5,994.

#### V. DISCHARGE.

See DISCHARGE, 161, 238, 263.

53. Where one partner is adjudicated on his individual petition, without notice to his fellow partners, it is proper for his assignee to institute proceedings in bankruptcy against the firm, as such partner cannot be properly discharged until the firm debts are paid, or the social assets administered in the bankrupt court. In re Grady et al., Ass., v. Hawthorne et al., 3 N. B. R. 54; Fed. Cas. 5,654.

54. A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court. Hudgins v. Lane et al., 11 N. B. R. 462; 3 Hughes, 361; Fed. Cas. 6,827.

55. The fact that one member of a bankrupt firm did not file a schedule of debts or inventory of effects, nor deliver his property into the hands of the assignee, does not affect the right of the other partners to receive a discharge. In re Scofield et al., 3 N. B. R. 137; Fed. Cas. 12,509.

56. A discharge properly granted to the individual members of a firm will be available in respect to any indebtedness of any other partnership in which they are interested and for whose debts they might be liable. In re Leland, 5 N. B. R. 223; Fed. Cas. 8,228; 5 Ben. 163; 1 Amer. Law T. Rep. Bankr. 284.

57. A, B, C. & D. were partners. A. sold to B, C. & D. and retired, leaving assets and debts in the hands of B, C. & D., the new firm. Part of the assets were used to pay part of the debts. A. filed a petition as an individual and B, C. & D. as a firm. All had a common assignee. A. had no individual debts. His application for a discharge was refused, the court holding that the assignee had no jurisdiction over the assets of the firm of A, B, C. & D., there never having been a formal assignment to the firm. In re Plumb, 17 N. B. R. 76; 9 Ben. 279; 6 N. Y. Wkly. Dig. 70; Fed. Cas. 11,231.

58. Where the several members of a firm file several petitions and there are firm assets, the estate of the firm is not in the bankruptcy court so as to operate a discharge of the firm debts, even though the several petitions set out the partnership assets and liabilities and though they have a common assignee. Id.

59. Where a member of a late copartnership files his individual petition and inserts debts of said copartnership, and there are no partnership assets to be administered, he will be entitled to be discharged from all of his debts, and it is unnecessary that other partners be made parties to the proceeding. In re Abbe, 2 N. B. R. 26; 7 Amer. Law Reg. (U. S.) 824; 15 Pittsb. Leg. J. 589; Fed. Cas. 4

60. A surviving partner of a firm, the

other members of which had died insolvent, filed his individual petition for an adjudication in bankruptcy. *Held*, that a discharge founded on such petition would probably operate as a discharge from the partnership as well as individual debts, but that it is safer to amend the petition. In *re Bidwell*, 2 N. B. R. 78; Fed. Cas. 1,392.

61. A member of a firm actually existing and having assets cannot be adjudicated a bankrupt and discharged from his liabilities individually and as a member of the firm, unless his copartners are joined with him. In *re Winkens*, 2 N. B. R. 113; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 17,875.

62. A partner may be bankrupt while the remaining partners as individuals, and the firm itself, may be solvent. The bankrupt partner has an unquestionable right to be discharged from all his debts provable under the act. In *re Stevens*, 5 N. B. R. 112; 1 Sawy. 397; 1 Pac. Law Rep. 45; Fed. Cas. 13,393.

63. Where a discharge in bankruptcy is granted to a member of a firm, it is a release of joint debts as well as of separate debts. *Wilkins v. Davis*, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

64. A discharge binds copartners as well as joint creditors, where granted to a copartner. *Id*.

65. If, in a voluntary petition of partners, the names of parties who should be joined as petitioners are not so joined, the bankruptcy court will refuse to discharge the petitioning creditors. *Citizens' Nat. Bank v. Cass et al.*, 18 N. B. R. 279; 6 Wkly. Notes Cas. 371; 6 Rep. 579; 19 Alb. Law J. 119; 26 Pittsb. Leg. J. 25; Fed. Cas. 2,732.

66. A suit was brought by a firm creditor against a firm, one member of which had been individually adjudicated bankrupt. The bankrupt pleaded his discharge. *Held*, that such discharge was no bar if the creditor could show that there were partnership assets at the time of the filing of the petition in bankruptcy. *Crompton et al. v. Conkling, Jr., et al.*, 15 N. B. R. 417; Fed. Cas. 3,408.

67. Of the firm A., B. & C., A. and B. sold their interests to D. and E., who, with C., formed the new firm of C., D. & E., which undertook and promised to pay the debts of the firm A., B. & C. One debt of the old

firm remained unpaid, and C., in the name of A., B. & C., executed a note in favor of C., D. & E., which was indorsed by them to the debtor. This note was renewed several times and the debt remained unpaid, A. and B. being deceived as to that, when C., D. & E. were declared bankrupts and received their discharge. A. and B. paid the debt, and in an action against C., D. & E., *held*, that their discharge in bankruptcy was a bar to the action. *Brown et al. v. Broach et al.*, 16 N. B. R. 296.

68. Where the same persons are members of two firms, one of which has proved a claim against the bankrupt and the other has not, the latter firm has no standing to appear in opposition to the discharge. In *re Palmer*, 3 N. B. R. 77; Fed. Cas. 10,682.

## VI. EXEMPTIONS.

### See EXEMPTIONS, VII.

69. Where partners purchase lots taking the title bond in the firm name, with an understanding that each shall own the lot on which he builds, each is entitled to a homestead exemption. *Bartholomew, Ass., v. West et al.*, 8 N. B. R. 12; 2 Dill. 290; 7 West. Jur. 441; Fed. Cas. 1,071.

70. A firm and one member of the firm individually were adjudged bankrupts. The individual member claimed an exemption out of the partnership effects. *Held*, the claim could not be allowed. In *re Stewart & Newton*, 13 N. B. R. 295; 2 N. Y. Wkly. Dig. 3; Fed. Cas. 13,420.

71. Partnership assets are a trust fund for the payment of the creditors of the firm, and an exemption cannot be set apart from them to the individual partners until the partnership debts are paid. In *re Croft Bros.*, 17 N. B. R. 324; 6 N. Y. Wkly. Dig. 218; 8 Biss. 188; 10 Chi. Leg. News, 204; 6 Amer. Law Rec. 597; Fed. Cas. 3,404.

72. Only the surplus after paying all the partnership debts and the expenses becomes liable to the provisions in reference to exemptions under state laws. In *re Price*, 6 N. B. R. 400; 1 Md. Law Rec. 236; Fed. Cas. 11,410.

73. In the absence of fraudulent intent, partners may dissolve the partnership and sever their interest in the property, or one

partner sell his interest to the other, and the continuing partner may have his exemption the same as though no partnership had existed. In re Bjornstad, 18 N. B. R. 282; 9 Biss. 18; Fed. Cas. 1,458.

74. The individual members of a firm are not entitled to an exemption from the partnership stock. In re Boothroyd & Gibbs, 14 N. B. R. 223; Fed. Cas. 1,652.

75. A. and B. filed a joint petition in bankruptcy and were adjudged bankrupts. Held, that they were not entitled each to the amount allowed as exempt by a state statute. In re Hughes et al., 16 N. B. R. 464; 8 Biss. 107; Fed. Cas. 6,842.

76. The state exemption laws have been decided by state courts not to apply to partnership property, and the words of the act of congress manifestly refer only to separate property of the debtor. In re Hafer et al., 1 N. B. R. 147; 25 Leg. Int. 148; 15 Pittsb. Leg. J. 8 89; Fed. Cas. 5,896.

## VII. ASSETS.

### (a) *General.*

77. When real estate is purchased with partnership funds, it becomes personalty of the partnership, the partners being tenants in common. If there be a survivor, the share of the deceased partner in the surplus of the real estate after the payment of the partnership debts and the adjustment of claims between individual members of the firm is considered as real estate only in a controversy between the heirs at law and the personal representatives of the deceased. Marrett, Ass., v. Murphy et al., 11 N. B. R. 181; 1 Cent. Law J. 554; Fed. Cas. 9,103.

78. Buildings built with partnership funds by one member of the firm, or property owned solely by such member, become part of the realty and the separate property of such partner. In re Parks et al., 9 N. B. R. 270; Fed. Cas. 10,765.

79. On dissolution of the partnership A. B., A. received for his interest a sum in cash, notes of B., and a portion of the book accounts, which he collected and invested the money in a homestead. B. became bankrupt, and in an action to reach the money paid by B. to A., and collected by A., and to charge the homestead, it was held that the

money received by A. and the homestead were liable for the partnership debts. In re Sauthoff & Olson, 16 N. B. R. 181; 8 Biss. 35; 5 Cent. Law J. 364; Fed. Cas. 12,380.

80. The purchase of both partners' interests, at sales under different executions, does not enlarge the interests acquired, or relieve the assets from the claims of partnership creditors. Osborne v. McBride, 16 N. B. R. 22; 8 Sawy. 590; Fed. Cas. 10,598.

81. Where real estate held by partners as tenants in common is classified in the schedule as partnership assets, such classification will not convert the separate property of the individual partners into firm property. In re Zug, 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 84 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

82. If partners, more than four months before the commencement of bankruptcy proceedings, transfer all their property, both separate and joint, to one partner, who undertakes to pay the firm debts, all the assets should be treated as the separate assets of that partner. In re Collier, Taylor & Co., 12 N. B. R. 266; Fed. Cas. 3,002.

83. When real estate is impressed with the character of personalty, the burden is upon the one alleging it to have lost that character to show not only that the partnership creditors have been paid, but that as between the partners the accounts have been settled. Hiscock, Ass. etc., v. Jaycox & Green, 12 N. B. R. 507; Fed. Cas. 6,531.

84. The intent to consider realty to be partnership assets may be implied from the fact that the losses are to be sustained by the assets of the firm and the profits are to augment the capital. *Id.*

85. Oral evidence may be received to prove that lands are the property of the partnership, and such evidence being clear, the property is to be treated as partnership assets. In re Farmer et al., 18 N. B. R. 207; 10 Chi. Leg. News, 395; Fed. Cas. 4,650.

86. An individual member of a firm should include in his schedule his interest in the partnership. In re Brick, 19 N. B. R. 508.

### (b) *Distribution.*

#### See DIVIDENDS, II, (b).

87. Where there are individual creditors and partnership creditors, and individual as-

sets and partnership assets, the individual creditors must resort to the individual assets and the joint creditors to the partnership assets. In re Jewett, 1 N. B. R. 130; 7 Amer. Law Reg. (N. S.) 291; Fed. Cas. 7,304.

88. A debtor purchased the interest of his copartner, and afterward became bankrupt. There were both individual and partnership creditors, but only individual assets. *Held*, that the partnership creditors were entitled to be paid *pari passu* with the individual creditors. *Id.*

89. Under the operation of the act of 1800, a creditor of a firm of which the bankrupt was one, and a creditor of the bankrupt singly, were equal creditors of the bankrupt in contemplation of law. Tucker v. Oxley, 5 Cranch, 34.

90. The rule that the joint estate must be applied to pay the firm debts, and the separate estate to pay the individual debts, applies only when both estates are before the court for distribution. United States v. Lewis et al., 13 N. B. R. 33; 2 Wkly. Notes Cas. 31; 22 Int. Rev. Rec. 39; 32 Leg. Int. 371; 23 Pittsb. Leg. J. 34; Fed. Cas. 15,595; In re Pease, 13 N. B. R. 163; Fed. Cas. 10,881.

91. If a bankrupt partner was a member of two firms, the assets of the bankrupt firm should be applied to pay the firm debts, and any surplus of the individual assets of such partner, remaining after paying his individual debts, should be distributed *pro rata* among the creditors of both firms. In re Dunkerson & Co., 12 N. B. R. 391; 4 Biss. 323; 1 N. Y. Wkly. Dig. 179; Fed. Cas. 4,159.

92. The individual and partnership creditors share equally in the distribution of assets where both classes of debts have been incurred upon the strength of the possession of the property owned by a member of the firm. In re Goedde & Co., 6 N. B. R. 295; Fed. Cas. 5,500.

93. Firm creditors cannot share in the individual, where there are firm assets, until the individual creditors are paid in full. In re Smith et al., 13 N. B. R. 500; Fed. Cas. 12,987.

94. The English rule which requires creditors both of the joint and separate estates in bankruptcy to elect does not obtain in the United States. In re Foot et al., 12 N. B. R. 337; 8 Ben. 228; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 4,906.

95. R., L and S. were members of a co-

partnership, and, being indebted to a bank, executed to it four notes in the firm and individual names, the firm note being indorsed by R., and that of each individual being indorsed by the other members. *Held*, that the holders of the notes were entitled to participate in the distribution of the assets of the individual estates of the members of the copartnership as well as that of the partnership. Mead, Ass., v. Bank of Fayetteville et al., 2 N. B. R. 65; 7 Amer. Law Reg. (N. S.) 818; 1 Amer. Law T. Rep. Bankr. 108; 15 Pittsb. Leg. J. 137; Fed. Cas. 9,306.

96. Partnership property is first taken to pay partnership debts, and the separate estates of partners is first taken for individual obligations, and creditors of neither have a right to resort to the assets primarily belonging to the other before the preferred claims are paid in full. In re McLean et al., 15 N. B. R. 333; Fed. Cas. 8,879.

97. Where there is a joint fund the joint creditors take it, and where there is a separate fund the separate creditors take it. In re Byrne, 1 N. B. R. 122; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; 15 Pittsb. Leg. J. 315; Fed. Cas. 2,270.

98. In the payment of partnership debts the assets of the firm must be applied without any reference to any disproportion of the interests of the individual partners as between themselves. In re Lowe et al., 11 N. B. R. 221; Fed. Cas. 8,564.

99. The bankrupt and A. were partners. A. was insolvent and there was no joint property. *Held*, that the estate should be distributed *pari passu* among the individual and firm creditors. In re Knight, 8 N. B. R. 436; 18 Int. Rev. Rec. 166; 30 Leg. Int. 338; 21 Pittsb. Leg. J. 43; Fed. Cas. 7,830.

100. Under the bankrupt act of 1837, the creditors of the firm, as well as the individual creditors of a partner who has assumed to pay the firm debts, were entitled to share *pari passu* in the estate of such partner. In re Downing, 3 N. B. R. 132; 1 Dill. 33; 17 Pittsb. Leg. J. 169; 2 Chi. Leg. News, 265; Fed. Cas. 4,044.

101. Where one who was a member of a late firm files his individual petition in bankruptcy, all his creditors can prove their claims, whether individual or partnership. In re Frear, 1 N. B. R. 201; 2 Ben. 467; 35 How. Pr. 249; Fed. Cas. 5,074.

## VIII. CONVEYANCES AND TRANSFERS.

See CONVEYANCES, 7; MORTGAGES, 9, 20; ASSIGNMENTS, 60; DEEDS, 7; ESTATES, 258, 284.

(a) *To Partners.*

102. Where one of two partners sells his interest in the concern to his copartner, taking his notes therefor, and the second partner becomes bankrupt, leaving some of the notes unpaid, the first partner cannot receive a dividend from the assignee until all the partnership debts have been paid. In re Jewett, 1 N. B. R. 181; 7 Amer. Law Reg. (N. S.) 291; Fed. Cas. 7,304.

103. Where, on the dissolution of a copartnership, the joint property is transferred to one of the firm without fraud or collusion, for the purpose of defeating the rights of the joint creditors to close the partnership affairs, such joint property becomes the transferee's separate estate; the mere fact of the transfer not affecting the rights of the joint creditors; the joint property, after its transfer, being as much within the reach of legal process by the firm's creditors as if still partnership property; such creditors, beyond such right of seizure of legal process, and before insolvency proceedings, having no control over the partnership effects or any right to restrain their disposition. In re Long & Co., 9 N. B. R. 227; 7 Ben. 141; Fed. Cas. 8,476.

104. A partner transferred to another partner in good faith his interest in the firm prior to bankruptcy. *Held*, that such transfer was valid. Shiner, Ass., v. Huber et al., 19 N. B. R. 414; 14 Phila. 402; 86 Leg. Int. 839; 8 Reporter, 398; Fed. Cas. 12,787.

105. Where a firm is insolvent the sale of his interest by one partner to another is not of itself fraudulent. Russell, Ass., v. McCord, Ass. etc., 17 N. B. R. 508; 2 Flip. 139; 3 Cin. Law Bul. 594; Fed. Cas. 12,157.

106. A transfer of firm property from one member of the firm to another is not a fraud upon the creditors of the firm, nor does it hinder or delay them or constitute a preference contrary to the provisions of the bankrupt act. In re Munn, 7 N. B. R. 468; 3 Biss. 442; 7 Amer. Law Rev. 751; Fed. Cas. 9,925.

107. A *bona fide* transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his

separate estate. In re Byrne, 1 N. B. R. 122; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 2,270.

(b) *To Strangers.*

108. A conveyance by a partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy against the firm, even though the conveyance was made with intent to hinder, delay or defraud the creditors, or with a view to give a preference to a firm creditor. In re Redmond & Martin, 9 N. B. R. 408; Fed. Cas. 11,632.

109. A member of a firm borrowed money on an individual obligation for the use of the firm, and the firm subsequently gave a chattel mortgage to secure the debt. *Held*, this was an adoption of the debt by the firm, and was not in fraud of the bankrupt law. Wait, Ass. etc., v. The Bull's Head Bank, 19 N. B. R. 500; Fed. Cas. 17,043.

110. Whenever a partner receives from any partner in payment for a debt due from that partner only, a debt or obligation of the firm in any form, the presumption of the law is that the partner gives this, and the creditor receives it, in fraud of the partnership. Taylor, Ass., v. Rasch & Bernart, 5 N. B. R. 399; 4 Amer. Law T. 201; Fed. Cas. 13,801.

111. A conveyance by a partner in a firm, to his wife, of real estate, purchased by the withdrawal of more than a third of the partner's share in the capital, is void, and the assignee in bankruptcy is entitled to the proceeds of such property. Phipps et al. v. Sedgwick, Ass. etc., 16 N. B. R. 64; 95 U. S. 3.

112. To take the property of an insolvent firm to pay a debt which is not a partnership debt, but for which each of the partners is liable, is an act of bankruptcy. In re Matot et al., 16 N. B. R. 485; 5 N. Y. Wkly. Dig. 529; Fed. Cas. 9,282.

113. Money taken from the partnership assets, and paid as money of the copartnership, if it can be recovered at all, must be claimed by the partnership in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate. Amsink et al. v. Bean, Ass., 11 N. B. R. 495; 23 Wall. 395.

114. Where a firm, known by the partners to be insolvent, is dissolved, and the



silent partner conveys all his interest in the property to the active partner, who mortgages the whole stock to secure the pre-existing debt of a separate creditor of each partner, and neither partner had any separate estate, the transaction is a fraudulent preference. *In re Waite*, 1 N. B. R. 84; 1 Lowell, 207; Fed. Cas. 17,044.

## IX. TRUSTEES.

See TRUSTEE, 125, 153; ESTATES, VIII, 85.

### (a) *Of Firm.*

115. While section 36 of the act of 1867 is explicit that the separate estate of each bankrupt partner shall pass to the assignee in bankruptcy, it is equally explicit that it is the creditors of the firm only who shall participate in choosing him. *In re Phelps et al.*, 1 N. B. R. 139; 2 Amer. Law T. Rep. 25; Fed. Cas. 11,071.

116. Upon a partnership being adjudged bankrupt, the assignee shall be chosen by the creditors of the partnership, but he shall keep separate accounts of the property of the copartnership and of the separate estate of each member. *Amsink et al. v. Bean, Ass.*, 11 N. B. R. 495; 22 Wall. 395.

117. The assignees in bankruptcy of the joint stock and property of a copartnership are required to administer the separate estate of the individual members of the firm as well as of the copartnership, but not where an individual member alone is adjudged a bankrupt. *Id.*

118. The assignee can adjust all the credits and debits of the individuals to the firm and the members, provided he permits the partnership creditors to obtain their pay out of the partnership estate, and the separate creditors of each partner out of his separate estate. *Atkinson v. Kellogg*, 10 N. B. R. 535; 7 Chi. Leg. News, 9; Fed. Cas. 618.

119. Where at the time a firm is adjudged bankrupt there is pending an action for accounting by one partner against the other, the right to continue the suit passes to the assignee, and such partner will be enjoined from further proceedings. *In re Clark & Bininger*, 3 N. B. R. 123; 4 Ben. 88; 3 N. B. R. 130; 1 Amer. Law T. Rep. Bankr. 189; Fed. Cas. 2,798.

### (b) *Of Individual Member.*

120. Where one partner is bankrupt, his assignee may recover from a solvent partner, either at law or in equity, what is due under the articles of copartnership. *Wilkins v. Davis*, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

121. The control of the settlement of the joint affairs may be intrusted, by a court of equity, either to the assignee or the solvent partner. *Id.*

122. One member of a firm of copartners, on behalf of the firm, may execute a power of attorney to some third person, authorizing him to cast the vote of the firm in the choice of assignees. *In re Barrett*, 3 N. B. R. 165; 2 Hughes, 444; 1 Chi. Leg. News, 202; 11 Int. Rev. Rec. 21; Fed. Cas. 1,048.

123. The assignee in bankruptcy of two members of a firm consisting of three copartners cannot recover a preference given by the firm to a firm creditor. *Withrow v. Fowler*, 7 N. B. R. 339; Pac. Law Rep. 102; 6 Alb. Law J. 423; Fed. Cas. 17,919.

124. A, B. and C., under an agreement to furnish the outlay and share in the profit and loss equally, purchased a parcel of real estate for the purpose of dividing it up into lots and selling it again. A. and B. bought out the interest of C. and continued the business until the bankruptcy of B. In a controversy between the assignee and A. as to their rights in the real estate left, it was held that it was necessary to adjust the partnership dealings at the commencement of proceedings in bankruptcy and ascertain the exact interest of each. *Thrall v. Crampton, Ass. etc.*, 16 N. B. R. 261; 9 Ben. 218; Fed. Cas. 14,008.

125. An assignee, more than two years after his appointment, entered his appearance in a suit which had been begun by the bankrupt before the commencement of bankruptcy proceedings for the partition of a partnership. *Held*, that he could do so. *Latting v. Fassman et al.*, 17 N. B. R. 183.

126. An assignee of an individual member of a firm appointed upon his petition alone acquires no title to the property of the firm, whether the firm be existing or dissolved. *Hudgins v. Lane et al.*, 11 N. B. R. 462; 2 Hughes, 361; Fed. Cas. 6,827.

127. In a separate adjudication against a bankrupt, who is or has been a member of a firm, the separate creditors are entitled to vote for assignee. In *re Falkner*, 16 N. B. R. 508; Fed. Cas. 4,624.

128. A., at the time he was adjudged a bankrupt, was a member of the firm A. B. At the meeting of creditors, the register permitted both joint and separate creditors of A. to prove their debts and vote for assignee. No assignee having been elected, the register appointed the person voted for by a joint creditor, assignee. *Held*, that the joint creditor was entitled to prove his debt and vote for assignee. In *re Webb*, 16 N. B. R. 258; 4 Sawy. 326; 10 Chi. Leg. News, 27; 5 N. Y. Wkly. Dig. 174; Fed. Cas. 17,817.

#### X. JURISDICTION OF COURTS.

See COURTS, 25, 172, 176, 178, 218.

129. One member of a firm filed a petition in one state and requested his copartners to join, which they refused but afterward consented to do, and all were declared bankrupts. The copartners did not reside in the judicial district in which the petition was filed. Objection to the jurisdiction of the court was overruled. In *re Penn et al.*, 5 N. B. R. 30; 5 Ben. 89; 3 Chi. Leg. News, 225; Fed. Cas. 10,927.

130. One member of a partnership had not resided in the district for six months next preceding the filing of a petition in bankruptcy against the firm. The residence of the partners was the only allegation in support of the jurisdiction of the court. *Held*, the jurisdiction of the court as respects all the debtors and the entire cause was defeated. In *re Beals et al.*, 17 N. B. R. 108; 9 Ben. 223; Fed. Cas. 1,165.

131. In the matter of the petition of two copartners for adjudication as bankrupts, it appeared that they transacted business in the city of New York, and that there were no individual debts or assets. *Held*, that as one of the copartners did not live in the judicial district in which the petition was filed, the court had no jurisdiction over him. In *re Frankard*, 1 N. B. R. 51; Fed. Cas. 11,360.

132. A., being a member of a firm doing business in one state but domiciled in another, moved to dismiss the proceeding in

bankruptcy in the state of his domicile and have the cause removed to the district where the business was conducted and his partner resided and had filed a petition. *Held*, that proceedings should be stayed. In *re Smith*, 8 N. B. R. 15.

#### XI. DISSOLUTION.

##### (a) *What is.*

133. If one partner be adjudicated bankrupt the partnership is dissolved. *Blackwell v. Claywell et al.*, 15 N. B. R. 300.

134. A partnership is dissolved by the bankruptcy of one partner. *Wilkins v. Davis*, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

##### (b) *Effect of.*

135. The rights of firm creditors will not be affected by the dissolution of the firm by agreement of the members. *Hudgins v. Lane et al.*, 11 N. B. R. 462; 2 Hughes, 361; Fed. Cas. 6,827.

136. Dissolution of a partnership by mutual consent can have no effect upon the rights of creditors then existing, nor upon those who subsequently become creditors, if the members of the firm continued to treat each other as partners after the dissolution, and to act as such in their business transactions with others, and a petition in bankruptcy can still be filed against the members of a firm as though there had never been any dissolution. In *re McFarland & Co.*, 10 N. B. R. 381; Fed. Cas. 8,788.

137. B. petitioned for an adjudication in bankruptcy against himself and his late copartner, A., and it appeared that upon the dissolution of the firm B. agreed to pay the joint debts, and gave bond to A. with a solvent surety to secure him against his liability for those debts. Therefore the petition was dismissed as against A. In *re Bennett et al.*, 12 N. B. R. 181; 2 Lowell, 400; Fed. Cas. 1,314.

138. One partner of a dissolved firm filed a petition against his two copartners. It appeared from the schedule that the firm was dissolved by judicial decree, and that the assets were transferred to a receiver and that there were firm debts. *Held*, that the firm

could not be adjudicated. In *re Hopkins v. Carpenter et al.*, 18 N. B. R. 339; Fed. Cas. 6,686.

139. Three parties, constituting a firm, contracted a debt, giving a firm note. Afterwards the firm was dissolved. A retired and B. & C. continued the business, agreeing with A. to pay all outstanding debts of the old firm. This agreement was not known to the creditors, who never released A. B. & C. became bankrupt and the creditor proved his claim, but only received payment of part thereof. Afterwards A. became bankrupt. *Held*, that the creditor could prove the balance of his claim against the estate of A. in bankruptcy and take *pro rata* with other creditors. In *re Pease*, 13 N. B. R. 168; Fed. Cas. 10,881.

140. Where upon the dissolution of a partnership one partner takes the accounts and notes of the firm, and the other the stock in trade, to which he adds and with which he continues the business, the stock in the hands of the latter, upon the subsequent bankruptcy of the former partners, will be held primarily liable for his individual debts. In *re Montgomery*, 3 N. B. R. 109 (1st case); 3 Ben. 565; Fed. Cas. 9,727.

141. Though a firm be dissolved it may still exist as to the creditors, under section 36 (act of 1867), and the several members may be adjudged bankrupt on the petition of one, without the consent of the others. In *re Foster & Pratt*, 3 N. B. R. 57; 3 Ben. 386; Fed. Cas. 4,962.

142. Two partners who were afterwards adjudged bankrupts in separate suits dissolved partnership, but one partner carried on the business in the firm name with the consent of his copartner. Firm creditors sought to share in the estate of the retired partner. *Held*, that the firm creditors could prove against the share which the retired partner had in the business. In *re Morse*, 13 N. B. R. 376; Fed. Cas. 9,854.

143. One of the members retired from a firm, but permitted his name to be used, although notice of his separation was published in certain newspapers. The firm exchanged notes with B., who sold to the petitioner for value before maturity. *Held*, the former partner was liable thereon. In *re Krueger et al.*, 5 N. B. R. 439; 2 Lowell, 66; Fed. Cas. 7,941.

## XII. CLAIMS.

See CLAIMS, 49, 133-150, 250, 252; PROOF OF CLAIMS, 4, 35; SECURED CLAIMS, 56; COMMERCIAL PAPER, VI.

### (a) *Of Firm Creditors.*

#### (1) *Against Firm Assets.*

144. Notes drawn by one partner in the firm name, apparently in the course of partnership business, without *mala fide* or actual knowledge by the holder of want of authority or intended misapplication, entitle the holder to their allowance against the bankrupt estate of the firm. *Van Camp Bush v. Crawford, Ass.*, 7 N. B. R. 299. Reversing *In re Dunkle and Dreisbach*, 7 N. B. R. 107.

145. A joint request made by the individual members of a firm soliciting B. to become a surety of one of them in an administration bond does not create a liability of the firm. *Forsyth v. Woods, Ass.*, 5 N. B. R. 78; 11 Wall. 484.

146. Where notes were fraudulently given by one partner in the name of the firm for his separate debt, and the partner defrauded, upon learning of the issue of two of said notes, by an agreement of dissolution of the partnership, purchased his copartner's interest in the firm for a sum of money payable by the appropriation of a portion thereof to the payment of the said two notes, and the balance on or before a stipulated time, and the partnership was subsequently adjudged bankrupt, but any claim against the partnership estate upon any of the notes being disallowed, it was held that the effect of the agreement of dissolution as to the said two notes was not a ratification of them by the defrauded partner as firm obligations, but an assumption of them as his separate debts, the claims upon said two notes remaining also separate debts of the partner who had issued them. *Dunkle v. Dreisbach*, 7 N. B. R. 107; Fed. Cas. 4,161.

147. Where the individual property of a member of a firm is security for the partnership debts, the creditor may prove, and indeed is bound to prove, at the request of the separate creditors, his whole debt against the joint assets; but only the deficiency may be allowed after disposing of the security against the separate assets of the individual partner.

In re May & Co., 17 N. B. R. 192; Fed. Cas. 9,327.

148. A firm which indorses a note given by a member, which falls due after the firm's bankruptcy, need not have notice of the dishonor of such note in order to prove it against the social assets. *Ex parte Russell*, 16 N. B. R. 476; Fed. Cas. 12,148.

149. Most of the debts against a bankrupt copartnership were purchased in the interest of two copartners by friends to whom they furnished money, the third copartner not contributing. *Held*, that unpaid debts should be paid, and that the amount paid by friends of the copartners must be refunded to them. In re Lathrop et al., 5 N. B. R. 48; 5 Ben. 199; Fed. Cas. 8,104.

150. When a man and his wife hold themselves out to the world as partners in trade and the firm becomes bankrupt, the partnership creditors are entitled to be paid in preference to individual creditors of the husband out of the partnership assets. In re Kinkad, 7 N. B. R. 439; 8 Biss. 405; 7 West. Jur. 110; 6 Amer. Law T. Rep. 45; 5 Chi. Leg. News, 217; 1 Amer. Law Rec. 533; 3 Bench & Bar (U. S.), 41; Fed. Cas. 7,824.

151. Two debtors trading as N., agent, became bankrupt and left assets. They formerly did business as N. & Co. and failed leaving no assets. Creditors of N. & Co. claimed that they were entitled to share in the assets of the bankrupts. *Held*, that they were so entitled. In re Nims et al., 18 N. B. R. 91; 10 Ben. 58; 26 Pittsb. Leg. J. 11; Fed. Cas. 10,268.

## (2) Against Separate Assets.

152. In the case of the separate bankruptcy of one member of a firm, a joint creditor is entitled to prove his joint debt. In re Webb, 16 N. B. R. 258; 4 Sawy. 326; 10 Chi. Leg. News, 27; 5 N. Y. Wkly. Dig. 174; Fed. Cas. 17,317.

153. Judgment was recovered on the note of the firm A., B., C. & D. in an action in which D. was not served with process. On the bankruptcy of the firm, *held*, that the judgment could not be paid out of the proceeds of the sale of real estate, the legal title to which was in D. In re Hinds et al., 8 N. B. R. 91; Fed. Cas. 6,516.

154. A creditor filed separate proofs of debt for the same amount against the individual members of a partnership, which claims were objected to and the objection was overruled. In re Beers et al., 5 N. B. R. 211; Fed. Cas. 1,229.

155. A promise by a partner to pay all the firm debts may be enforced by the firm creditors, although they were not cognizant of the promise when made, and although the consideration did not move from them. In re Collier, Taylor & Co., 12 N. B. R. 266; Fed. Cas. 3,002.

156. If there be no joint partnership estate, the firm creditors may share *pari passu* in the separate estate. *Id.*

157. A joint creditor can prove under a separate bankruptcy, though not to compete in the separate assets, and may vote for assignee, and be heard on the discharge, and examine the debtor, and share any joint assets or any surplus of the separate assets. *Wilkins v. Davis*, 15 N. B. R. 60; 2 Lowell, 511; Fed. Cas. 17,664.

158. One member of a firm made statements, in ordinary conversation, to a party concerning the business of the firm, on the strength of which the party bought, from a third person, a note of the firm. *Held*, that although the representation was false, the individual member was not liable. In re Schuchardt et al., 15 N. B. R. 161, 8 Ben. 585; Fed. Cas. 12,483.

159. A firm, some of whose members were foreigners, became indebted to the United States. The resident members constituted another firm, which firm and its members became bankrupt. *Held*, that the United States were entitled to priority of payment out of the separate estates of the bankrupts. *United States v. Lewis et al.*, 13 N. B. R. 33; 2 Wkly. Notes Cas. 31; 22 Int. Rev. Rec. 39; 32 Leg. Int. 371; 23 Pittsb. Leg. J. 34; Fed. Cas. 15,595.

160. Where one member of the copartnership, upon the firm's dissolution, receives the firm assets and agrees to pay the firm debts, upon the subsequent bankruptcy of the firm, the firm creditors, at their election, prove as separate creditors of the liquidating copartner's estate, and share *pari passu* with the individual creditors. In re Long, 9 N. B. R. 227; 7 Ben. 141; Fed. Cas. 8,476.

161. A bankrupt partner is entitled to the benefit of the payment by the solvent partner to the amount of said solvent partner's liability. In re Cooke & Co., 12 N. B. R. 30; 1 Wkly. Notes Cas. 318; Fed. Cas. 3,170.

162. The creditor of a partnership may proceed at law against the surviving partners, or go in the first instance into equity against the representatives of the deceased partner. Lewis, Trustee, v. United States, 14 N. B. R. 64; 92 U. S. 618.

163. In order to charge a secret partner for debts contracted in the name of the firm of which he is a dormant partner, it is necessary to show that such debts were contracted in the name and business of the firm, or that the secret partner had an interest in the contract or profits. In re Munn, 7 N. B. R. 468; 3 Biss. 442; 7 Amer. Law Rev. 751; Fed. Cas. 9,925.

164. Where the purchaser of a note did not know that there were any secret partners with the persons whose names appeared upon its face, and for whose individual benefit it was given, and placed the proceeds to the credit of the holder, the secret partners would not be liable. The fact that such purchaser afterwards proved his claim in bankruptcy against the signers of the note goes to show that he understood them alone to be liable and discounted it upon their responsibility. *Id.*

### (3) General.

165. Where a creditor holds the note of a copartnership indorsed by one of its members, he may prove in bankruptcy against both the copartnership fund and the separate estate and elect out of which fund he will be paid, or collect dividends from both funds. Stephenson v. Jackson, Ass., 9 N. B. R. 255; 2 Hughes, 204; Fed. Cas. 13,374.

166. In the absence of fraud, joint debts may be converted into individual debts by one partner's undertaking for a good consideration to pay them. In re Collier, Taylor & Co., 12 N. B. R. 266; Fed. Cas. 3,002.

167. L., at the request of a bankrupt firm, became the owner of all claims against it, and agreed to indemnify said firm against all claims which existed at the commencement of the proceedings. The firm had in-

dorsed the notes of L. for his accommodation, which he used in purchasing the claims against the firm, and he agreed to indemnify them against any liability on those notes, they transferring to him all the assets of the firm. *Held*, that the indorsements were contracts independent of the indebtedness of the firm to their creditors, made for his accommodation; and that the taking of the notes so indorsed extinguished the original indebtedness of the firm and substituted the notes for it, so that such indorsements could not be regarded as contracts to pay the original indebtedness of the indorsers. In re Loder, 4 N. B. R. 50; 4 Ben. 305; Fed. Cas. 8,457.

168. An arrangement for an exchange of patronage was entered into between certain members of two firms, though a special partner knew nothing of the arrangement. *Held*, that the arrangement was not within the scope and purposes of the partnership, and special partners could not be bound respecting any liabilities contracted by general partners not within said scope and purposes. Taylor v. Rasch et al., 11 N. B. R. 91; 1 Flip. 385; 1 Cent. Law J. 555; 31 Leg. Int. 365; Fed. Cas. 18,800.

### (b) Of Individual Creditors.

169. Where creditors held paper executed by the individual members of a partnership, although the original consideration has passed to the partnership, the creditors will be held to be the individual creditors of each of the bankrupts. In re Bucyrus Machine Co., 5 N. B. R. 303; Fed. Cas. 2,100.

170. Every creditor of a firm is also a creditor of each partner, but a creditor of one member of a firm is not a creditor of the firm nor has he any interest in the property of a bankrupt partnership. His interest in property which his debtor owns in common with the partners is in the share that may be left to his debtor after paying all partnership debts and all claims due the copartners. In re Phelps et al., 1 N. B. R. 139; 2 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,071.

171. A and B entered into a partnership by which it was agreed that the firm should assume the individual debts. The firm having become bankrupt, one of the individual

creditors endeavored to prove his claim against the firm assets. There was no evidence that the creditor had consented to the conversion of liabilities. *Held*, that the rule prevented him from proving his claim. In re Isaacs & Cohn, 6 N. B. R. 92; 3 Sawy. 35; Fed. Cas. 7,093.

172. Where all the members of one firm are partners in another, and a bank discounts a draft drawn by the former firm upon one individually who is a partner in the latter firm, the bank must look for payment to the separate estate of the drawee and cannot prove its claim thereon against the joint estate, although the draft was drawn on account of a firm debt. In re Savage et al., 16 N. B. R. 368; Fed. Cas. 12,381.

173. Where a party who accepts the note of one partner for a loan which is obtained for the firm does not know that it is for the firm, he cannot sue the firm after having obtained judgment against the individual partner. In re Herrick, 18 N. B. R. 313; Fed. Cas. 6,420.

174. A bond whereby several members of a firm bind themselves jointly and severally to pay the amount therein expressed may be proven against and paid from the assets of the individual estate of each member of the firm. In re Bigelow et al., 2 N. B. R. 121; 3 Ben. 146; 2 Amer. Law T. Rep. Bankr. 41; Fed. Cas. 1,397.

175. B, a member of the firm B. & Co., was treasurer of a corporation for which B. & Co. were general business agents, and authorized to receive and disburse moneys, except subscriptions to its capital stock. B. received subscriptions and paid the money into the business of his firm. No acquiescence on the part of the corporation appeared. *Held*, that proof could be made against both estates. In re Baxter et al., 18 N. B. R. 62; Fed. Cas. 1,119.

176. A loaned to B, of the firm of B. & C., a sum of money which A. knew was not to be used for firm purposes, B. giving a note signed in the firm name. *Held*, that A.'s claim against the firm assets should be rejected. In re Forsyth et al., 7 N. B. R. 174; Fed. Cas. 4,948.

177. Individual members of a copartnership signed internal revenue tobacconists bonds as accommodation sureties. The firm

being adjudged bankrupt, and the conditions of the bonds having been broken, the debts thereon were proved in bankruptcy, and priority of payment to the United States, out of the partnership assets, claimed. *Held*, that the debts were individual debts and not entitled to priority. In re Webb & Johnson, 2 N. B. R. 183; 2 Amer. Law T. Rep. Bankr. 87; 9 Int. Rev. Rec. 169; 16 Pittsb. Leg. J. 43; Fed. Cas. 17,313.

### (c) *Between Joint and Separate Estates.*

178. No proof can be made in bankruptcy between the joint and separate estates, in respect either of money drawn out without fraud by one partner, or of goods sold to him by the firm, though he was to sell them again. In re Boynton, 10 N. B. R. 135.

179. Where partnership debts are outstanding, on which a bankrupt's partner is liable, such partner has a lien on the real estate of the firm until the debts are paid, to indemnify him in the event of his having to pay them. Thrall v. Crampton, Ass. etc., 16 N. B. R. 261; 9 Ben. 218; Fed. Cas. 14,008.

180. A firm can be a separate creditor of one of its members. In re McLean et al., 15 N. B. R. 333; Fed. Cas. 8,879.

181. One C. was assignee of a firm and of each of the two members, one of whom owed the firm a sum much greater than his interest in it. The assignee petitioned the court to be authorized to pay the claim of the firm against the debtor partner on the same basis as his other separate debts. The debtor's separate estate was only sufficient for his individual debts. *Held*, that the assignee could prove such claim against the debtor partner, but could not take in the distribution of the estate until his individual debts were paid. *Id.*

182. Debts due by the bankrupt partner to the partnership are entitled to priority in preference to the debts due by him to his separate creditors, and, if the joint funds prove insufficient to discharge his debt to the partnership, the solvent partners have a right to prove the deficiency against the separate estate of the bankrupt *pari passu* with the separate creditors. Amsink et al. v. Bean, Ass., 11 N. B. R. 495; 22 Wall. 395.

183. Where all the parties become bankrupt, the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors. *Id.*

184. No proof can be made in bankruptcy between the joint and separate estates in respect either of money drawn out without fraud by one partner or of goods sold to him by the firm, though he was to sell them again. *In re Lane & Co.*, 10 N. B. R. 185; 2 Lowell, 298; Fed. Cas. 8,044.

(d) *Partner Against Partner.*

185. A member of a copartnership of banking firms, termed a syndicate, became bankrupt, having in its possession a sum of money in excess of its own share of the profits of the syndicate. Another member of the syndicate sought to prove a claim for the whole amount so held, on behalf of itself and its associates. *Held*, it could claim only the difference between the whole amount and the bankrupt's share. *In re Cooke & Co.*, 12 N. B. R. 80; 1 Wkly. Notes Cas. 318; Fed. Cas. 8,170.

186. If a solvent partner pay all the partnership debts, his proof against the separate estate of his bankrupt partners cannot include the portion of said debts which upon a settlement of the accounts would be properly payable by him. *Id.*

187. A solvent partner cannot prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified. *Amsink et al. v. Bean, Ass.*, 11 N. B. R. 495; 23 Wall. 895.

188. The firm A. & B. were sureties for a debt which was paid out of the firm assets. On dissolution of the partnership a balance was due to B. from A., who subsequently went into bankruptcy. *Held* that, as against other creditors of A., B. could not be subrogated to the rights of the creditor whose claim the firm satisfied, against A.'s estate. *In re Smith*, 16 N. B. R. 113; Fed. Cas. 12,991.

189. One member of a firm died and his

administrators allowed the surviving partner to continue the business under the same firm name, but without a new partnership agreement. He became bankrupt. *Held*, that the administrators could only come in as any other creditor, the surviving partner having converted the property of his dead partner to his own use with the knowledge and consent of the administrators. *In re Mills*, 11 N. B. R. 74; Fed. Cas. 9,611.

190. A partner who has had to pay all the firm debts can prove against his bankrupt partner his proportion of the debts which he had paid, and an agreement in respect thereto which is set aside as void will not prevent him from claiming this right of contribution. *In re Stephens*, 6 N. B. R. 533; 3 Biss. 187; Fed. Cas. 13,365.

191. A bankrupt creditor of his bankrupt copartner has the residuum of the estate, separate and joint, belonging to the latter after all the separate creditors of the debtor bankrupt and the joint debts of the firm are paid, but not before. *In re McLean et al.*, 15 N. B. R. 333; Fed. Cas. 8,879.

192. Plaintiffs and defendants formed a limited partnership, and in connection therewith the defendants became indebted to the plaintiffs. *Held*, that such debt was not a fiduciary one. *Pierce v. Shippee*. 19 N. B. R. 221.

193. Where a partner retires from a firm and agrees to pay all the partnership debts, as between themselves the remaining partner is a surety for the retiring partner, but in case the surety has not actually paid any such debts, he cannot prove his claim against the estate of the retiring partner for the excess of such debts over the dividends to be paid. *In re Phelps*, 17 N. B. R. 144; 9 Ben. 286; Fed. Cas. 11,070.

194. Where a firm consisting of two partners carries on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate act of the active partner. *In re Waite et al.*, 1 N. B. R. 84; 1 Lowell, 207; Fed. Cas. 17,044.

(e) *Between Firms.*

195. A claim of one firm of which the bankrupt is a partner against another firm

of which he is a partner is not a debt provable in bankruptcy against him. *In re Lloyd*, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 298; 24 Pittsb. Leg. J. 118; Fed. Cas. 8,429.

196. A firm, all of whose members are partners in another firm, cannot prove its debts against the latter. *In re Savage*, 16 N. B. R. 368; Fed. Cas. 12,381.

### XIII. GENERAL.

See COMMERCIAL PAPER, 6.

197. One member of a firm cannot estop himself, as between himself and the firm creditors, by any dealings with a partner, from any duty that he owes such creditors. *In re Gorham*, 18 N. B. R. 419; 9 Biss. 23; 11 Chi. Leg. News, 58; 26 Pittsb. Leg. J. 112; Fed. Cas. 5,624.

198. When all the members of a firm petition for the benefit of the act, they are jointly and severally bound to make the required statements of their debts, whether co-partnership or individual, or due by them jointly with other persons not parties to the petition. *In re Leland*, 5 N. B. R. 222; 5 Ben. 168; 1 Amer. Law T. Rep. Bankr. 284; Fed. Cas. 8,228.

199. A partnership is not entitled to retain, toward the payment of its debt, the surplus arising from the securities held by one partner for his debt. *Sparhawk et al. v. Drexel et al.*, 12 N. B. R. 450; 1 Wkly. Notes Cas. 560; Fed. Cas. 13,204.

200. The commencement of a proceeding in bankruptcy against one partner within four months after the issuing of an attachment against the firm does not dissolve the attachment. Where the attachment is issued more than four months before the commencement of proceedings in bankruptcy, the proceedings for a judgment *in rem* will not be stayed. *Mason et al. v. Warthen et al.*, 14 N. B. R. 346.

201. Three men were associated as partners and after two years ceased business. Several years later one of the three was adjudicated a bankrupt and received his discharge. The assignee sold all the assets, and the bankrupt became the purchaser and afterward brought an action on one of the claims so purchased. The defendant pleaded

the statute of limitations. *Held*, that the statute ran from the time of adjudication. *Blackwell v. Claywell et al.*, 15 N. B. R. 300.

202. The note of a third person, given and received in payment of a debt of another, is a valid contract, and extinguishes the original debt; and a note given by a partner in payment of the debt of a firm, as to such debt, is the note of a third person. *In re Parker et al.*, 19 N. B. R. 340; Fed. Cas. 10,721.

203. There are but two ways in which partners may be joined in a voluntary petition: either by their own act, or by the act of the partners petitioning. *In re Harbaugh et al.*, 15 N. B. R. 246; 15 Alb. Law J. 194; 23 Int. Rev. Rec. 50; 24 Pittsb. Leg. J. 100; Fed. Cas. 6,045.

204. An act of one partner which amounts to a defense against an action thereafter brought, if it had been performed by all the members of the firm, will, although in fraud of the other and innocent partner, be a defense not only in an action brought by him individually, but by any other firm of which he was at the time a member. *Capelle, Ass. v. Hall*, 12 N. B. R. 1; Fed. Cas. 2,391.

205. An individual partner cannot bind the concern by a note or contract given or made for his individual debt, or use or benefit, without the consent of his copartners, express or implied; nor can he, without such consent, use partnership funds or property to pay a prior individual debt, or cancel an indebtedness to the firm by crediting upon its books an individual indebtedness of himself. *Taylor, Ass. v. Rasch et al.*, 5 N. B. R. 309; 4 Amer. Law T. 201; Fed. Cas. 13,801.

206. Articles of copartnership, when published, are sufficient notice to all persons dealing with a limited partnership of the scope of said partnership business. *Taylor v. Rasch et al.*, 11 N. B. R. 91; 1 Flip. 385; 1 Cent. Law J. 555; 81 Leg. Int. 365; Fed. Cas. 13,800.

207. Where a firm own and operate a farm, and the members own stock in, and are officers of, a manufacturing corporation which is solvent, they are not "tradesmen" within the meaning of the bankrupt act. *In re Stickney*, 17 N. B. R. 305; 5 Dill. 91; 5 Rep. 586; 5 Cent. Law J. 265; Fed. Cas. 13,439.

208. A rule for judgment was asked for want of a sufficient affidavit of defense. The



suit was an action on the case for the value of certain furniture, brought by two members of a firm. The affidavit of defense set forth that said members were also members of a certain copartnership, another member of which had filed a petition in bankruptcy as to himself and his copartners. No adjudication had been made. Judgment granting the rule. *Booth v. Meyer et al.*, 14 N. B. R. 575.

209. A receiver of a copartnership cannot maintain an action of trover in his own name against a person who has converted assets of the firm before his appointment. He is a mere custodian, and must sue in the name of the firm in whom was the legal right of action. *Lansing v. Manton*, 14 N. B. R. 127; 3 N. Y. Wkly. Dig. 112; Fed. Cas. 8,077.

210. If a surviving partner, holding the joint assets for purposes of administration, commit an act of bankruptcy, the joint assets and his own separate estate may be taken under the bankrupt act. In re *Stevens*, 5 N. B. R. 112; 1 Sawy. 397; 1 Pac. Law Rep. 45; Fed. Cas. 13,393.

211. *Semble*, a member of a bankrupt firm cannot represent claims against the estate. In re *Mittledorfer & Co.*, 3 N. B. R. 9; Chase, 276; Fed. Cas. 9,674.

212. A firm dissolved, with the written agreement that one member should assume and pay its obligations, including outstanding commercial paper. Payment thereof was suspended, and was not resumed in fourteen days (act of 1867). *Held*, that such suspension was an act of bankruptcy, and it is unnecessary to allege or prove fraud in such suspension. In re *Weikert & Parker*, 3 N. B. R. 4; Fed. Cas. 17,361.

213. Partnership assets must be administered according to the thirty-sixth section of the act of 1867, and likewise the assets of the separate estate of the bankrupt. In re *Frear*, 1 N. B. R. 201; 2 Ben. 467; 35 How. Pr. 249; Fed. Cas. 5,074.

214. Where a citizen of one state voluntarily made himself a party in the bankruptcy court of another state and received a dividend on his debt, he was held bound to the same extent that citizens of the former state were bound. *Clay v. Smith*, 3 Pet. 411.

## PAYMENT.

### I. TO OR BY A BANKRUPT.

(a) *Before Proceedings Begun.*

(b) *After Proceedings Begun.*

### II. HOW MADE.

### III. SUSPENSION OF.

### IV. DOES NOT PRECLUDE CREDITOR.

See ACCOUNT, 4; BANKS, 29; CLAIMS, 236; PETITIONS, 145; SALES, 33.

### I. TO OR BY A BANKRUPT.

(a) *Before Proceedings Begun.*

1. A payment by a debtor in insolvent circumstances more than four months before the commencement of proceedings in bankruptcy, although a preference, will be sustained under section 35 of the bankrupt act of 1867. *Maurer, Ass., v. Frantz*, 4 N. B. R. 142.

2. Where a debtor, cognizant of his insolvency and expecting to stop payment, makes a payment for a just debt with a view of giving a preference, such payment is fraudulent. In re *Gregg*, 4 N. B. R. 150; Fed. Cas. 5,797.

3. Payments made by an insolvent debtor before bankruptcy proceedings are presumed to have been made with a view on the part of the debtor to give a preference. In re *Forsyth & Murtha*, 7 N. B. R. 174; Fed. Cas. 4,948.

4. A bankrupt, making payments in the course of business with the *bona fide* expectation of being able to continue business and with no intention to give a preference, is not thereby deprived of his right to a discharge. In re *Brant*, 8 N. B. R. 444; 2 Dill. 129; 18 Int. Rev. Rec. 159; Fed. Cas. 1,832.

5. Payment made by an insolvent, which would otherwise be void under sections 35 and 39 of the bankrupt act of 1867, is not excepted out of that provision because made to holder of his overdue note on which there was a solvent indorser whose liability had already been fixed by notice and protest. *Bartholow et al. v. Bean, Ass.*, 10 N. B. R. 241; 18 Wall. 635.

6. A., banker, discounted note of B. upon which C. was indorser. Before its maturity

C. waived protest and notice and note remained unpaid. B. paid the amount to A. In the meantime B. failed and entered into composition, which A. did not sign, and B. was insolvent when he paid the note; petition in bankruptcy was filed less than four months after payment of note. *Held*, the payment was void under sections 35 and 39. *Id.*

7. Payments to creditors who have recovered judgment and issued execution before the commencement of proceedings in bankruptcy are to be included in the assets of a voluntary bankrupt, in the computation to determine the per cent. of assets. In re Taggart, 16 N. B. R. 351; Fed. Cas. 13,725.

### (b) *After Proceedings Begun.*

8. Payment to or by bankrupt after commencement of proceedings in bankruptcy is void, though made *bona fide* and without notice. Mays v. Mfrs. Nat. Bank of Phila., 4 N. B. R. 147.

9. Payments to the petitioning creditors are material facts, and evidence of them may be introduced without a special traverse, and the receipt of such payments to an amount sufficient to reduce the indebtedness below the minimum jurisdictional amount must be considered a waiver of the alleged act of bankruptcy. In re Skelley, 5 N. B. R. 214; 8 Biss. 260; Fed. Cas. 12,921.

10. Payments made by creditors to a bankrupt after the filing of the petition in bankruptcy are invalid as against the assignee. In re Hayden, 7 N. B. R. 192; Fed. Cas. 6,257.

11. Although proceedings in bankruptcy are pending against him, a debtor who is solvent may pay any or all of his debts. In re Oregon Bul. Pr. & Pub. Co., 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

12. A payment to a bankrupt, after the filing of the petition for adjudication, will not discharge the debtor's liability to an after-appointed assignee. Until, therefore, the appointment of an assignee, or the dismissal of the petition, the right of action against the debtor is suspended. Babbitt v. Burgess, 7 N. B. R. 561; 2 Dill. 169; 5 Chi. Leg. News, 326; Fed. Cas. 693; Booth v. Meyer et al., 14 N. B. R. 575.

## II. HOW MADE.

13. A decree that a judgment be paid in gold coin is just and proper in California. Edmondson v. Hyde, Ass., 7 N. B. R. 1; 2 Sawy. 205; 5 Amer. Law T. Rep. (U. S. Cts.) 380; Fed. Cas. 4,285.

14. Bonds issued in aid of the Rebellion, when accepted by a creditor in payment of his debt, and while they are of value as a medium in the money markets, constitute a valid medium for the payment of a debt, provided the contract in which they were used was not in aid of the Rebellion. Holleman v. Dewey, Ass., 7 N. B. R. 269; 2 Hughes, 341; Fed. Cas. 6,607.

15. A tender according to the terms of a composition is equivalent to payment. In re Hinsdale, 16 N. B. R. 550; 9 Ben. 91; Fed. Cas. 6,526.

## III. SUSPENSION OF.

16. A suspension of payment of commercial paper for fourteen days, under section 39, before the amendment of July 14, 1870, was *per se* an act of bankruptcy, and the failure to pay it for fourteen days after the passage of the amendment, although it was due and dishonored before the passage, is a suspension within the meaning of the amendment. Baldwin v. Wilder, 6 N. B. R. 85; Fed. Cas. 806.

## IV. DOES NOT PRECLUDE CREDITOR.

17. The receipt by a creditor of part of his claim does not preclude him from petitioning to have his debtor adjudged a bankrupt if the creditor offers to bring this payment into the registry of the court. In re Mercer, 6 N. B. R. 351; 29 Leg. Int. 76; Fed. Cas. 9,060.

## PENALTIES.

See CRIMES AND OFFENSES.

## PETITION.

### I. WHO MAY FILE

- (a) *Corporations, When.*
- (b) *Creditors, When.*
- (c) *Partners, When.*
- (d) *In General.*

**II. WHO MAY NOT FILE**

- (a) *Corporations, When.*
- (b) *Creditors, When.*
- (c) *Partners, When.*

**III. AGAINST WHOM**

- (a) *Corporations.*
- (b) *Partners.*
- (c) *Persons Under Disabilities.*
- (d) *In General.*

**IV. NUMBER OF CREDITORS AND AMOUNT OF DEBTS.**

- (a) *Allegations as to.*
- (b) *How Counted.*
- (c) *General.*

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**I. WHO MAY FILE.**

(a) *Corporations, When.*

See CORPORATIONS, 14, 16, 19.

1. Under the provisions of section 87 of the bankrupt act of 1867, the filing of a petition in bankruptcy on behalf of a corporation can only be authorized by a vote of the majority of the corporators at a legal meeting called for the purpose. In re "Lady Bryan Mining Co.," 4 N. B. R. 181; 2 Abb. (U. S.) 527; 1 Sawy. 349; Fed. Cas. 7,978.

2. An insurance company is one of that class of corporations intended to be within the scope and provisions of the general bankruptcy law. In re Merchants' Ins. Co., 6 N. B. R. 43; 8 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

3. It is a question of fact to be determined by the district court whether the

president of a corporation is duly authorized to file a petition on its behalf. New Lamp Chimney Co. v. Ansonia Brass and Copper Co., 13 N. B. R. 385; 91 U. S. 656.

(b) *Creditors, When.*

4. A petition may be filed by a creditor against his debtor upon a claim which is not yet due, if it is provable in bankruptcy. Linn et al. v. Smith, 4 N. B. R. 12; 3 Amer. Law T. 218; 1 Amer. Law T. Rep. Bankr. 229; Fed. Cas. 8,375.

5. The receipt by a creditor of part of his claim does not preclude him from petitioning to have his debtor adjudged a bankrupt if the creditor offers to bring this payment into the registry of the court. In re Marcer, 6 N. B. R. 351; 29 Leg. Int. 76; Fed. Cas. 9,060.

6. A creditor, believing his debtor to be insolvent, may sue, and by proceeding to judgment compel the debtor himself to apply to be decreed a bankrupt, or, if he do not, but suffers his property to be taken on legal process in such manner as gives priority to such creditor, he may then allege this as an act of bankruptcy and himself demand an adjudication. Cox v. Hale, 8 N. B. R. 562; 10 Blatchf. 56; 21 Pittsb. Leg. J. 77; Fed. Cas. 3,310.

7. Creditors who sign a petition must be held to good faith in the matter, and cannot recklessly file a petition for the purpose of making the alleged bankrupt file a statement of his creditors. In re Scammon, 11 N. B. R. 280; 6 Biss. 195; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 12,429.

8. A creditor who was induced to release his claim without consideration through the fraudulent representations of another creditor has a debt that will support a petition in bankruptcy. Michaels et al. v. Post, Ass., 13 N. B. R. 152; 21 Wall. 398.

9. That the larger creditors should be requested to sign petition for adjudication and refuse is not necessary. In re Currier, 13 N. B. R. 68; 2 Lowell, 436; Fed. Cas. 3,492.

10. Certain creditors of a corporation filed a petition asking to have it adjudicated bankrupt. Defendant answered denying that the petitioners constituted one-fourth in number and one-third in value of its creditors. Petitioners moved to strike out the denial as in-

relevant. *Held*, that any creditor may maintain a petition to have a corporation adjudged a bankrupt under section 5122, Revised Statutes, and the provision as to number and amount of creditors does not apply. In re Oregon Pub. & Pr. Co., 13 N. B. R. 199; 10 Amer. Law Rev. 380; 8 Chi. Leg. News, 81; Fed. Cas. 10,558.

11. A person has a right to purchase, in good faith, claims against a debtor, with a view to joining in a petition in bankruptcy to make the necessary number. In re Woodford & Chamberlain, 13 N. B. R. 575; 1 Cin. Law Bul. 37; Fed. Cas. 17,972.

12. The co-operation of the debtor in securing creditors, by lawful means, to unite in an involuntary petition is no ground for setting aside an adjudication. In re Duncan et al., 14 N. B. R. 18; 8 Ben. 365; Fed. Cas. 4,181.

13. The bankrupt act does not prohibit a creditor's bringing compulsory proceedings in a state court, where debtor refuses to file a voluntary petition, and where sufficient number of creditors are not ready to file a petition against him: *Geery's Appeal*, 17 N. B. R. 196.

### (c) *Partners, When.*

See PARTNERS, 17, 20.

14. Where one partner is adjudicated a bankrupt on his individual petition, without notice to his fellow partners, it is proper for his assignee to institute proceedings in bankruptcy against the firm, as such partner cannot be properly discharged until the firm debts are paid or the partnership assets administered in the bankrupt court. In re Grady et al., Ass. v. Hawthorne et al., 3 N. B. R. 54; Fed. Cas. 5,654.

15. One of three members retiring from a firm, the other two continued the business for a while and then filed a petition for bankruptcy. On objection by the retired partner, *held*, that the court had jurisdiction of such petition, and cause ordered to proceed. In re Mitchell et al., 8 N. B. R. 111; Fed. Cas. 9,658.

16. The proceeding by the petition of one of several copartners adjudicated bankrupt is a proceeding partly voluntary and partly involuntary. In re Penn et al., 5 N. B. R. 30;

5 Ben. 89; 3 Chi. Leg. News, 225; Fed. Cas. 10,927.

17. For the purpose of petitioning, a partnership is held to subsist so long as there are outstanding debts against the firm or assets undistributed belonging to it. In re Hunt, Tillinghast & Co. v. Pooke & Steere, 5 N. B. R. 161; Fed. Cas. 6,896.

18. After proceedings have been commenced in a state court by one of the members of a copartnership to put an end thereto, and for an account, and the property is in the hands of a receiver, it is competent for another member of the firm to file a petition in bankruptcy to have himself and the firm adjudged bankrupt. In re Noonan, 10 N. B. R. 330; 3 Biss. 491; 5 Chi. Leg. News, 557; 39 Leg. Int. 425; 21 Pittsb. Leg. J. 73; Fed. Cas. 10,292.

19. Where there have been distinct firms of A. & B. and A. & C., the three persons cannot be joined in one proceeding in bankruptcy, even though the latter firm may have undertaken to pay the debts of the former. In re Wallace & Newton, 12 N. B. R. 191; Fed. Cas. 17,095.

20. Partnerships engaged in trade are made subject to the provisions of the bankrupt act, and, on the petition of the partners or any one of them, or of any creditor of the partners, such a partnership may be adjudged bankrupt. *Amsink et al. v. Bean, Ass.*, 11 N. B. R. 495; 22 Wall. 395.

21. There are but two ways in which partners may be joined in a voluntary petition: either by their own act, or by the act of the partners petitioning. In re Harbaugh et al., 15 N. B. R. 246; 15 Alb. Law J. 194; 23 Int. Rev. Rec. 50; 24 Pittsb. Leg. J. 100; Fed. Cas. 6,045.

22. The adjudication of a copartnership must be made on one petition, and cannot be made on the several petitions of the several members. In re Plumb, 17 N. B. R. 76; 9 Ben. 279; 6 N. Y. Wkly. Dig. 70; Fed. Cas. 11,231.

23. A voluntary petition in bankruptcy was filed by partners, an adjudication was had, and the property conveyed to an assignee. Nearly two years afterward a creditor of the firm filed a bill, alleging that two persons not named in the petition were copartners with the petitioners, and asked the court to order their joinder in the bank-

ruptcy proceeding. *Held*, that the creditors could not supply the omission, but could have the same remedies against such parties as they would have had before the petition was filed. *Cit. Nat. Bank v. Cass et al.*, 18 N. B. R. 279; 6 Wkly. Notes Cas. 371; 6 Rep. 579; 19 Alb. Law J. 119; 26 Pittsb. Leg. J. 25; Fed. Cas. 2,732.

(d) *In General.*

24. A person engaged in the general business of soliciting freight for a transportation company, and also in purchasing and shipping flour and grain, making his payments by liens drawn against his shipments, is a merchant and trader, and as such it is his duty to keep proper and correct books of account. *In re O'Bannon*, 2 N. B. R. 6; Fed. Cas. 10,394.

25. An alien resident within the United States is entitled to the benefits of the bankrupt law, and a residence for six months within the district in which application is made is not necessary. *In re Goodfellow*, 3 N. B. R. 114; 1 Lowell, 510; 3 Amer. Law T. Rep. Bankr. 69; Fed. Cas. 5,536.

26. The sale of goods bought without an intention of selling them again does not constitute the vendor a trader. *In re Rogers*, 3 N. B. R. 139; 1 Lowell, 423; Fed. Cas. 12,001.

27. Under section 3, as amended July 14, 1870, a banker, broker, merchant, trader, manufacturer or miner who *fraudulently* suspends payment of his debts can be proceeded against in bankruptcy *immediately*, and other persons after they have suspended payment of their *commercial paper* for fourteen days, whether fraudulent or not. *In re Hercules Mut. Life Ass. Soc.*, 6 N. B. R. 338; 6 Ben. 35; 6 Alb. Law T. 358; Fed. Cas. 6,402.

28. Where a decree in bankruptcy is rendered with the consent of the bankrupt, he waives the irregularity that less than the requisite one-fourth in number and one-third in value of creditors petitioned. *In re Williams et al.*, 11 N. B. R. 145; 8 Biss. 233; 7 Chi. Leg. News, 49; Fed. Cas. 17,700.

29. Petition was filed by bankrupt and assignee after adjudication, alleging that at time of filing creditor's petition bankrupt was member of firm which had debts exceeding \$300 and assets to be administered, and prayed that other members might be

brought in and firm adjudicated. *Held*, that relief was within power of court (1867). *In re Kelley*, 19 N. B. R. 326; Fed. Cas. 7,656.

II. WHO MAY NOT FILE.

See DISCHARGE, 13.

(a) *Corporations, When.*

30. Where the board of trustees of a company authorized their secretary to file petition for the purpose of having the corporation adjudicated bankrupt, *held*, that such filing was illegal, the trustees having no power to authorize their secretary to do so. *In re "The Lady Bryan Mining Co."*, 4 N. B. R. 86; Fed. Cas. 7,979.

31. Although the management of the affairs of a corporation is committed by the laws of the state to a board of trustees, such board cannot authorize the filing of a petition in bankruptcy under the bankrupt act of 1867, which devolves that authority upon a majority of the corporators, to be exercised at a meeting called for the purpose. *In re "Lady Bryan Mining Co."*, 4 N. B. R. 131; 2 Abb. U. S. 527; 1 Sawy. 349; Fed. Cas. 7,978.

(b) *Creditors, When.*

32. In opposition to petition it was alleged that proof of indebtedness did not show that petitioning creditor's debt existed at the time the alleged act of bankruptcy was committed. *Held*, that such creditor should not be allowed to maintain a petition. *In re Muller & Bretano*, 3 N. B. R. 86; Deady, 513; 2 Amer. Law T. Rep. Bankr. 33; Fed. Cas. 9,912.

33. Where, in answer to a petition, part payment is alleged, the petition cannot be maintained, if such part payment reduces the debt below the amount required by the bankrupt act. *In re Quinette*, 3 N. B. R. 140; 1 Sawy. 47; Fed. Cas. 10,622.

34. Where the policies in an insurance company are terminated, the insured do not become creditors of the company for the unearned premium, so that payment to them of such premiums constitutes such a preference as will support a petition for an adjudication in bankruptcy. *Knickerbocker Ins. Co. v. Comstock*, 9 N. B. R. 484; 6 Chi. Leg. News, 142; Fed. Cas. 7,879.

35. Where the alleged bankrupt has counter-claim against the petitioning creditor, being provable in bankruptcy, and such amount will reduce petitioning creditor's claim below \$250, the petition will be dismissed (act of 1867). In re Osage Valley & S. K. R. R. Co., 9 N. B. R. 281; 1 Cent. Law J. 83; Fed. Cas. 10,592.

36. A petition must be dismissed where it appears to the court by affidavit or otherwise that at the time of filing the petition the creditors who filed it knew that they did not constitute the requisite number. In re Scammon, 11 N. B. R. 280; 6 Biss. 195; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 12,429.

37. Where an indorsee receives payment from the indorser during pendency of proceedings, he cannot unite in the petition, even though he proved his claim before payment but had not filed it. In re Broich et al., 15 N. B. R. 11; 7 Biss. 803; Fed. Cas. 1,921.

38. A creditor cannot compel a debtor to go into voluntary bankruptcy, or compel partners to petition for the adjudication of alleged fellow partner. In re Harbaugh et al., 15 N. B. R. 246; 15 Alb. Law J. 194; 23 Int. Rev. Rec. 50; 24 Pittsb. Leg. J. 100; Fed. Cas. 6,045.

39. A. contracted that if B. would forbear to institute bankruptcy against C., he (A.) would pay C.'s debt to B. Held, that such contract was not forbidden by the bankrupt law; but in this case, the debt being less than \$250, B. had no right to file a petition, and the consideration for the contract failed. Ecker v. Bohn, 16 N. B. R. 544.

40. No creditor who has received a preference having at the time reasonable cause to believe his debtor insolvent is authorized to institute proceedings in bankruptcy. Ecker v. McAllister, 17 N. B. R. 42.

### (c) *Partners, When.*

See PARTNERS, 43.

41. Where a partnership is dissolved by the assignment by one member of his interest to a third person, the remaining partner is not entitled, under section 36 of the act of March 3, 1867, to maintain a petition that the original firm and each of its members be ad-

judged bankrupt. In re Hartough et al., 3 N. B. R. 107; Fed. Cas. 6,164.

42. Partner filed petition in bankruptcy against a copartner. Held, that such petition would not lie. Robinson et al. v. Hanway, 19 N. B. R. 289; 27 Pittsb. Leg. J. 21; Fed. Cas. 11,953.

## III. AGAINST WHOM.

### (a) *Corporations.*

See CORPORATIONS, 13, 15, 18, 20-22.

43. In proceedings against railroad company, respondents, held, that railroad corporations do not come within the bankrupt law. In re Opelousas & G. W. R. R. Co., 3 N. B. R. 81; Fed. Cas. 10,547.

44. The bankrupt act was not intended to apply to national banks, and therefore petition against a national bank must be dismissed for want of jurisdiction in the district court, the comptroller being the proper resort by especial congressional provision. Smith v. Manufacturers' Nat. Bank, 9 N. B. R. 122; Fed. Cas. 13,076.

45. An involuntary petition in bankruptcy against the officers or stockholders of a manufacturing corporation on account of their statutory liability cannot be sustained in Rhode Island by a judgment creditor of the corporation. James, Adm'r, v. The Atlantic Delaine Co. et al., 11 N. B. R. 390; Fed. Cas. 7,179.

46. A creditor filed a petition in involuntary bankruptcy to have a savings bank, a corporation, adjudged a bankrupt. Motion was made to dismiss the petition on the ground that it did not allege that the petition was presented by one-fourth in number of the creditors and representing one-third in amount of debts. The motion was sustained (act of 1867). In re Leavenworth Sav. Bank, 14 N. B. R. 82; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,166.

47. Under the amendatory act of June 23, 1874, the same proportion of creditors must join in an involuntary proceeding against a corporation as is required in case of a natural person. In re Leavenworth Sav. Bank, 14 N. B. R. 92; 4 Dill 363; 3 Cent. Law J. 207; Fed. Cas. 8,165.

48. Since the amendatory act of June 22,

1874, a corporation can no longer be subjected to compulsory bankruptcy upon the petition of a single creditor. In re Detroit Car Works, 14 N. B. R. 248; 8 N. Y. Wkly. Dig. 140; Fed. Cas. 8,883.

(b) *Partners.*

See PARTNERS, 16, 19-23, 42, 136.

49. A member of a partnership which has been dissolved and which has no assets which would pass to an assignee cannot be adjudicated a bankrupt without his consent upon the petition of one or more members thereof. In re Crockett, 2 N. B. R. 75; 2 Ben. 514; 2 Amer. Law T. Rep. Bankr. 21; Fed. Cas. 8,402.

50. A member of a firm actually existing and having assets cannot be adjudicated a bankrupt and discharged from his liabilities individually and as a member of the firm, unless his copartners are joined with him. In re Winkens, 2 N. B. R. 118; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 17,875.

51. Proceedings in involuntary bankruptcy were instituted against one William Lloyd, who was a partner in several different firms. The question arose as to whether firm debts were to be included in computing the number of creditors and amount of debts necessary to be represented by the petition, and the court held that both individual and firm debts must be computed. In re Lloyd, 15 N. B. R. 257; 15 Alb. Law J. 203; 24 Pittsb. Leg. J. 118; 5 Amer. Law Rec. 679; Fed. Cas. 8,429.

(c) *Persons Under Disabilities.*

52. A petition of involuntary bankruptcy against a married woman, founded upon a debt evidenced by notes which do not show on their face an intention to bind her separate estate, must allege that the notes were given for the benefit of her separate estate or else given by her, she being in trade, in the course of her business. In re Howland, 2 N. B. R. 114; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 6,791.

53. A. became insane after committing an act of bankruptcy. Held a petition in bankruptcy will lie against him. In re Pratt, 6 N. B. R. 276; 2 Lowell, 96; Fed. Cas. 11,371.

54. Petition was filed against a minor, who, after becoming of age, filed a petition of voluntary bankruptcy, in which he confirmed and ratified the former proceedings and asked the benefit of the bankrupt act. Held, that the proceedings while he was an infant were void, and that his confirmation did not operate as affirmation of the debt on which they were based. In re Derby, 8 N. B. R. 106; 6 Ben. 232; 6 Alb. Law J. 422; Fed. Cas. 8,815.

55. Petition cannot be filed against a married woman who, by the law of her domicile, is not capable of contracting. In re Goodman, 8 N. B. R. 380; 5 Biss. 401; Fed. Cas. 5,540.

(d) *In General.*

56. Involuntary proceedings in bankruptcy may be instituted against a debtor, although the debt is not yet due, if it is a provable debt. In re Alexander, 4 N. B. R. 45; 1 Lowell, 470; 18 Pittsb. Leg. J. 81; 3 Amer. Law T. Rep. 280; 1 Amer. Law T. Rep. Bankr. 238; Fed. Cas. 161.

57. By his will A. nominated C. and D. his executors for the limited purpose of winding up his banking business, and a petition in bankruptcy filed against them was dismissed on the ground that under the powers conferred upon them by will they were not subject to the provisions of the bankrupt act. Graves et al. v. Winter et al., 9 N. B. R. 357; 6 Chi. Leg. News, 284; 1 Cent. Law J. 178; 21 Pittsb. Leg. J. 159; Fed. Cas. 5,710.

58. A man cannot be called upon to show cause why he shall not himself go or put anybody else into voluntary bankruptcy. In re Harbaugh et al., 15 N. B. R. 246; 15 Alb. Law J. 194; 23 Int. Rev. Rec. 50; 24 Pittsb. Leg. J. 100; Fed. Cas. 6,045.

IV. NUMBER OF CREDITORS AND  
AMOUNT OF DEBTS.

See CLAIMS, XII; COMMERCIAL PAPER, 40; COURTS, 18, 16; SCHEDULE, I, II, III; SECURED CLAIMS, 27.

(a) *Allegations as to.*

59. In all petitions pending in involuntary bankruptcy commenced since December 1, 1873, where no adjudication has been had, the petitioner must file a sworn amend-

ment to his petition alleging on information and belief that the petitioning creditors represent one-fourth in number and one-third in amount of the bankrupt creditors. In re Joliet I. & S. Co., 10 N. B. R. 60; Fed. Cas. 7,486.

60. Unless a petition for adjudication contain a clear, explicit and consistent allegation as to the proportionate number of creditors petitioning and the amount of debts represented by them, the court has no jurisdiction, and no amendments can be allowed. In re Rosenfields, 11 N. B. R. 86; 8 Amer. Law Rec. 724; 1 Cent. Law J. 583; Fed. Cas. 12,061.

61. A. was declared a bankrupt and assignee appointed; the bankrupt then filed affidavits to show that the proceedings were not in accordance with act of June 22, 1874, requiring one-fourth in number and one-third in amount of the creditors of the debtor to join in the petition. *Held*, that it is not necessary to amend the petition where there has been an adjudication before the amendatory act took effect. In re Raffauf, 10 N. B. R. 69; 6 Biss. 150; 6 Chi. Leg. News, 341; 21 Pittsb. Leg. J. 206; Fed. Cas. 11,525.

62. By amendment of June 22, 1874, every petition filed since December 1, 1873, to force a debtor into involuntary bankruptcy is required to allege that the petitioning creditors are one-fourth in number and one-third in value of the bankrupt's creditors. In re Scammon, 10 N. B. R. 66; 1 Cent. Law J. 328; 20 Int. Rev. Rec. 33; Fed. Cas. 12,430.

63. Petitioning creditors need not swear positively that they represent one-fourth in number and one-third in value of the creditors of the debtor, but that according to their best information and belief they represent this number and value. *Id*.

64. The petition must show, under the amendment of the bankrupt act of June 22, 1874, with as much certainty as possible, that the creditors uniting in the petition actually constitute the number requisite under the law. In re Scammon, 11 N. B. R. 280; 6 Biss. 195; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 12,429.

65. Under section 39 of bankruptcy act of 1867, where a creditors' petition alleges that the petitioners are one-fourth in number and one-third in amount, although the

claims of several creditors appear to be less than \$250 each, the petition would be valid. In re Hall, 15 N. B. R. 31; Fed. Cas. 5,923.

66. The petition in involuntary bankruptcy should contain the averment that the petitioners believe they do constitute one-fourth in number and one-third in amount of the bankrupt's creditors which are unsecured, it not being required that they should know. *Perin & Gaff Mfg. Co. v. Peale*, 17 N. B. R. 377; Fed. Cas. 10,981.

### (b) *How Counted.*

67. A debtor claimed that the requisite number of creditors had not signed a petition for the reason that the whole number of creditors should be counted. *Held*, that in counting the number requisite, only those owning debts "provable under the act" should be considered. In re Frost, 11 N. B. R. 69; 6 Biss. 213; 7 Chi. Leg. News, 42; Fed. Cas. 5,134.

68. The true construction of the proviso to the twelfth section of the amendatory act of June 22, 1874, where there are no creditors whose debts exceed said sum of \$250, etc., requires that where the creditors having debts of a less amount than \$250 are reckoned at all, they must be reckoned for all purposes, and in such case the petitioners must constitute one-fourth in number of all creditors, and the amounts of their provable debts must equal one-third of all provable debts. In re Hymes, 10 N. B. R. 433; 7 Ben. 427; Fed. Cas. 6,986.

69. The provision of amendment of June 22, 1874, required that in all cases commenced after December 1, 1873, and prior to the passage of the amendment, the debtor is to be adjudged a bankrupt upon the petition of one or more creditors who constitute at least one-fourth in number and one-third in amount, and that the fact that the debtor did not deny that the petitioning creditors constitute the requisite number in value and amount makes no difference. In re Scull, 10 N. B. R. 165; 7 Ben. 371; 10 Alb. Law J. 214; 1 Amer. Law T. Rep. 416; 20 Int. Rev. Rec. 80; 22 Pittsb. Leg. J. 34; Fed. Cas. 12,568.

70. Under act of March 2, 1867, as amended June 22, 1874, one or more creditors constituting one-fourth in number and one-third



in amount must join in the petition in involuntary bankruptcy. In *re Joliet Iron & Steel Co.*, 10 N. B. R. 60; Fed. Cas. 7,436.

71. Accrued interest constitutes part of a debt provable against the estate of the bankrupt and may be used to uphold involuntary proceedings. *Sloan v. Lewis*, 12 N. B. R. 173; 22 Wall. 150.

72. In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, under section 39 of the bankrupt act, as amended by section 12 of the act of 1874, creditors who have been fraudulently preferred by the debtor are not to be counted. In *re Israel*, 12 N. B. R. 204; 3 Dill. 511; 2 Cent. Law J. 219; Fed. Cas. 7,111.

73. In computing the number of creditors who must join in a petition for adjudication, creditors whose respective debts do not exceed \$250 are not to be reckoned, but in computing the amount or value of creditors all should be included. The aggregate of the petitioners' debts must be equal to one-third of all the debts, irrespective of the amount provable against the estate (act of 1867). In *re Hadley*, 12 N. B. R. 366; Fed. Cas. 5,894.

74. Though the aggregate of the debts of the petitioners whose debts exceed \$250 in amount does not equal one-third of all the debts exceeding \$250, a petition in involuntary bankruptcy should be sustained if the aggregate of all the petitioners' debts equal one-third of all the debts provable against the estate (1867). In *re Bergeron*, 12 N. B. R. 385; 2 Cent. Law J. 507; 1 N. Y. Wkly. Dig. 178; Fed. Cas. 1,342.

75. A creditor's petition for adjudication of bankruptcy is good if it represents one-fourth in number of the creditors whose debts exceed \$250; or if it represents one-fourth of all creditors and one-third of all debts (act of 1867). In *re Currier*, 13 N. B. R. 68; 2 Lowell, 433; Fed. Cas. 3,492.

76. In computing the amount represented by creditors joining in an involuntary petition, secured creditors are not to be reckoned. In *re Green Pond R. R. Co.*, 13 N. B. R. 118; Fed. Cas. 5,786.

77. In counting the number of creditors necessary to join in the petition, creditors under \$250 are not to be counted if one-fourth of the creditors above that sum join

in the petition (act of 1867). In *re Woodford & Chamberlain*, 13 N. B. R. 575; 1 Cin. Law Bul. 37; Fed. Cas. 17,972.

78. A creditor who has issued an attachment within four months before the commencement of proceedings in bankruptcy is to be reckoned in computing the proportion of creditors who must unite in an involuntary petition. In *re Scrafford*, 14 N. B. R. 184; 3 Cent. Law J. 252; Fed. Cas. 12,557.

79. When a creditor obtained a security, or lien, for his claim in fraud of the bankrupt act, or which would be avoided if the debtor is adjudged a bankrupt, he cannot be included in computing the number and value necessary to be joined in the petition. In *re Scrafford*, 15 N. B. R. 104; 4 Dill. 376; 3 N. Y. Wkly. Dig. 552; 3 Month. Jur. 614; Fed. Cas. 12,556; 3 Cent. Law J. 19.

80. The fact that a creditor is a trustee under a voluntary assignment, unless some fraud is connected with it, is not sufficient to exclude the creditor from being counted in estimating the number of creditors necessary to join in a petition in involuntary bankruptcy. In *re Lloyd*, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429.

81. Of four creditors to the amount of \$250 each, one joined in the petition, others for less amounts than \$250 made up one-third of the provable debts, but the number joining was less than one-fourth of the whole number of creditors. *Held*, a quorum was not made out (act of 1867). In *re Blair et al.*, 17 N. B. R. 492; 10 Chi. Leg. News, 278; 25 Pittsb. Leg. J. 123, 149; Fed. Cas. 1,481.

### (c) General.

82. In the original petition the creditors were insufficient in amount, and a supplemental petition was filed by a creditor whose claim exceeded \$250, and an admission that the two petitions included one-fourth of unsecured creditors whose claims equaled \$250 was filed by the debtor. *Held* insufficient, it being necessary that the creditors petitioning should be one-fourth of all whose claim equal \$250 (act of 1867). In *re Riker*, 18 N. B. R. 393; Fed. Cas. 11,833.

83. Even when a debtor has signed a written admission that the requisite quorum has

united in the petition, the court must still be satisfied that the admission is made in good faith. In *re* Flanagan, 18 N. B. R. 439; 5 Sawy. 812; 26 Pittsb. Leg. J. 128; Fed. Cas. 4,850.

84. A petition having been filed by the requisite number of creditors on the return day of the order to show cause, the petitioning creditors did not appear, but a creditor representing more than \$250 intervened and prayed an adjudication. *Held*, that he had the right, even if he did not constitute one-fourth in number or one-third in value of all the creditors (act of 1867). In *re* Sheffer, 17 N. B. R. 369; 4 Sawy. 363; 1 San Fran. Law J. 117; Fed. Cas. 12,742.

85. Debtors filed a denial that the proper number and amount of creditors had joined in the petition. No reference was made to ascertain the facts, but an entry of an order for reference appeared on the minutes of the judge. *Held*, that the judge was not called upon to fix a time within which additional creditors might join in the petition. In *re* Frisbie & McHugh, 15 N. B. R. 523; 14 Blatchf. 185; Fed. Cas. 5,129.

86. Where a petition in bankruptcy was filed by creditors, but the requisite number did not join, and afterward a supplemental petition was filed in which creditors joined, the total number being sufficient, it was held that the supplemental petition would not be dismissed because the requisite number of creditors had not joined in it. *Id*.

87. A petition in involuntary bankruptcy being filed, the debtor filed a denial that the petitioning creditor constituted one-fourth in number of the creditors, and that his claim aggregated one-third of the debts provable. The petitioning creditor moved to strike out the denial. Pending the motion, attachment creditors asked leave to intervene to oppose the petition, alleging that the requisite number and amount of creditors had not joined. Leave to intervene was granted. In *re* Scrafford, 14 N. B. R. 184; 3 Cent. Law J. 252; Fed. Cas. 12,557.

88. An attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication, on the ground that the requisite number and amount of creditors have not joined in the petition. In *re* Hatje, 12 N. B. R. 548; 6 Biss. 436; Fed. Cas. 6,215.

89. Where, by a comparison of lists, there appears uncertainty as to whether the debts of petitioning creditors equal one-fourth in number and one-third in amount, this is an issue to be determined upon evidence adduced, and the debtor must attend and submit to an examination, and the clerk must notify all creditors to be present at least ten days before hearing. In *re* Hymes, 10 N. B. R. 433; Fed. Cas. 6,986.

90. On the hearing of a petition in compulsory bankruptcy, when the debtor defendant declines to appear and defend in form, but is personally present, the court will hear a suggestion from any creditor, though it be one who is charged with receiving a fraudulent preference, that an insufficient number of creditors have joined in the petition, under the amendment of June, 1874. *Clinton et al. v. Mayo*, 12 N. B. R. 39; Fed. Cas. 2,999.

91. On motion of the bankrupt to dismiss proceedings against him for involuntary bankruptcy on ground that petitioning creditors did not amount to one-fourth in number and one-third in amount, *held*, that act of June 22, 1874, applied only to cases commenced since December 1, 1873, where there had been no adjudication. In *re* Angell, 10 N. B. R. 73; 1 Cent. Law J. 363; 6 Chi. Leg. News, 841; 31 Leg. Int. 254; 21 Pittsb. Leg. J. 206; Fed. Cas. 386.

## V. TIME.

See BANKRUPT LAW, 5; TIME, 3, 6.

92. The application of a creditor for an adjudication upon the petition of another creditor cannot be made after the return or adjourned day. In *re* Olmsted, 4 N. B. R. 71; Fed. Cas. 10,505.

93. The filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf or by a creditor against a debtor, upon which an order shall be issued adjudicating the debtor a bankrupt, shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act. In *re* Litchfield, 9 N. B. R. 506; 7 Ben. 259; Fed. Cas. 8,385.

94. The provision of the amendment of 1874 as to failure to pay commercial paper applied to cases instituted subsequent to

December 1, 1873, and a petition in bankruptcy on the ground of non-payment of commercial paper is premature if filed before the expiration of forty days from maturity of the paper. In *re Tivoli Brewing Co.*, 11 N. B. R. 470; Fed. Cas. 14,064.

95. The day on which the petition was filed is excluded in computing the time a preference must stand in order to be valid. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 831; 94 U. S. 558.

## VI. VENUE.

See COURTS, 274; PLACE OF BUSINESS.

96. Where a petitioner in bankruptcy had carried on business for a great many years prior to 1866 in New York city, and in that year moves to New Jersey to reside but still clerked in New York, his petition is properly filed in the southern district of New York. In *re Belcher*, 1 N. B. R. 202; 2 Ben. 468; Fed. Cas. 1,287.

97. The word "residence" in section 11 of the bankrupt act of 1867 is not synonymous with "domicile," and where a person, resident with his family in one place, buys a stock of goods in another, and goes there for business, leaving his family in the former place, the petition in bankruptcy is properly filed in the place where he carries on such business. In *re Watson*, 4 N. B. R. 197; Fed. Cas. 17,272.

## VII. CONTENTS.

98. An indorser's liability on a note constitutes a debt which may be made the foundation of either voluntary or involuntary proceedings in bankruptcy. In *re Nickodemus*, 3 N. B. R. 55; 2 Chi. Leg. News, 49; 16 Pittsb. Leg. J. 233; 2 Amer. Law T. 168; 1 Amer. Law T. Rep. Bankr. 140; Fed. Cas. 10,254.

99. Petition charged that respondent "fraudulently stopped payment of his commercial paper within a period of fourteen days." Held, too vague and general to throw the burden of disproving it upon respondent. In *re Randall & Sutherland*, 3 N. B. R. 4; Deady, 557; 2 Amer. Law T. Rep. Bankr. 69; 1 Chi. Leg. News, 209; Fed. Cas. 11,531.

100. In an involuntary proceeding in

bankruptcy it is necessary, in order that the court may have jurisdiction, that the petitioning creditor shall have a debt against the alleged bankrupt, provable under the act of 1867, and amounting to at least \$250. In *re Hunt & Hornell*, 5 N. B. R. 438; Fed. Cas. 6,882.

101. A debt wholly or partly secured will sustain a petition in bankruptcy. In *re Stansell*, 6 N. B. R. 183; Fed. Cas. 13,298.

102. A petitioner alleging a claim which is barred by the statutes of limitation cannot maintain a petition in involuntary bankruptcy for an adjudication declaring his alleged debtor a bankrupt. In *re Cornwell*, 6 N. B. R. 305; 9 Blatchf. 114; 6 Amer. Law Rev. 865; Fed. Cas. 3,250.

103. As the petition in bankruptcy is in the nature of pleading, it should set forth all facts material to the claim made by the creditor to an adjudication, so that the debtor may be distinctly apprised what he is called upon to answer. In *re Raynor*, 7 N. B. R. 527; 11 Blatchf. 48; 1 Amer. Law Rec. 786; Fed. Cas. 11,597.

104. A petition for adjudication in involuntary bankruptcy filed since December 1, 1873, but prior to June 22, 1874, must contain the allegation that the petitioners represent one-fourth in number and one-third in value of the creditors. In *re Scull*, 10 N. B. R. 165; 7 Ben. 871; 10 Alb. Law J. 214; 1 Amer. Law T. Rep. 416; 20 Int. Rev. Rec. 80; 22 Pittsb. Leg. J. 34; Fed. Cas. 12,568.

105. A creditor's petition not containing allegation as to number and amount of creditors, but accompanied by a paper purporting to be signed by debtor, admitting sufficiency in this respect, is not sufficient. In *re Keeler*, 10 N. B. R. 419; 20 Int. Rev. Rec. 82; Fed. Cas. 7,638.

106. The allegation that the petitioning creditors constitute the requisite amount and number of all creditors is not an allegation which has anything to do with the jurisdiction of the court. In *re Morris*, 11 N. B. R. 443.

107. A petition in bankruptcy against a corporation, which does not show that the corporation is either a moneyed, business or commercial corporation, is insufficient. In *re Oregon Bul. Pr. & Pub. Co.*, 14 N. B. R. 405; 3 Sawy. 614; 11 Amer. Law Rev. 181; 3 Cent.

Law J. 515; 14 Alb. Law J. 130; 3 Amer. Law T. Rep. (N. S.) 469; Fed. Cas. 10,561.

108. A petition of review was brought from the decision of the court below sustaining a demurrer to a petition in involuntary bankruptcy that stated upon "belief," but did not allege "knowledge or information," as to the number of creditors signing the petition. The order below was reversed. In re Mann, 14 N. B. R. 572; 13 Blatchf. 401; Fed. Cas. 9,033.

109. The allegation of residence, or carrying on of business, in the petition is the allegation of a jurisdictional fact, and the petition must contain an allegation in that respect. In re Beals et al., 17 N. B. R. 108; 9 Ben. 223; Fed. Cas. 1,165.

110. Petitioners must allege that they are creditors at the time of filing the petition. In re The W. Sav. & Tr. Co., 17 N. B. R. 413; 4 Sawy. 190; Fed. Cas. 17,442.

111. The claim of one of the creditors uniting in a petition was a note for \$250 falling due four days after the filing of the petition. *Held*, that it was not provable as a debt of \$250 at date of filing. In re Riker, 18 N. B. R. 393; Fed. Cas. 11,833.

### VIII. VERIFICATION.

112. A petition in bankruptcy must be signed and sworn to by a creditor himself and not by his attorney. In re Butterfield, 6 N. B. R. 237.

113. If neither the petition nor the deposition of the act of bankruptcy is signed by the petitioner, the defect is fatal. In re Hunt, Tillinghast & Co. v. Pooke & Steere, 5 N. B. R. 161; Fed. Cas. 6,896.

114. There is no express provision in the rules or orders in bankruptcy which forbids a petition to be sworn to by an agent or attorney of the petitioning creditor. When the agent is clothed with full authority and is able to present the proper authentication of the petition required by the forms, such petition should be entertained, although the petitioning creditor does not, in person, sign or swear to it. In re Raynor, 7 N. B. R. 527; 11 Blatchf. 43; 1 Amer. Law Rec. 736; Fed. Cas. 11,597.

115. The petition must be signed and verified by the same officers and in the same

manner as oaths in other cases to be used in United States courts. In re Sabin, 9 N. B. R. 383; Fed. Cas. 12,193.

116. A., in his affidavit to his petition in bankruptcy, swore that the schedule contained therein includes all his debts, when it was claimed he had omitted a certain creditor from his schedule fraudulently and wilfully. *Held*, that as the debt was contracted with the creditor in his individual capacity, and subsequent to the date of the partnership of the creditor, under which partnership name he is claiming notice as a creditor, it was not fraud or wilful omission. In re Pier-son, 10 N. B. R. 107; Fed. Cas. 11,153.

117. Creditors' petition was filed before act passed, and amended to meet requirements of act of June 22, 1874, and the debtor denied that the requisite number of creditors had joined. *Held*, general intent of the act of June 22, 1874, would seem to indicate that the list of creditors presented by the debtor in denial that the requisite number and amount have joined in the petition should be sworn to by the debtor. In re Steinman, 10 N. B. R. 214; 6 Biss. 166; 6 Chi. Leg. News, 338; 31 Leg. Int. 269; 21 Pittsb. Leg. J. 200; Fed. Cas. 13,357.

118. When several join in a petition in separate and distinct rights, each stands individually, and a verification by or on behalf of each petitioner is required. In re Simmons, 10 N. B. R. 253; 1 Cent. Law J. 440; Fed. Cas. 12,864.

119. Where requisite number of creditors is less than five, it is not necessary for a person verifying the petition as agent to state residences of his principals as foundation of his right to act. *Id*.

120. A petition was not verified as to certain of the petitioners and no proof of agency was shown as to others signed by agents. *Held*, that a verification of a petition for adjudication is such only as to persons named in the body of it, and is not such as to a person whose name is omitted, although signed by him, and in a case free from other difficulties supplementary proof may, in the discretion of the court, be received *nunc pro tunc* to establish the authority of the agent to sign and verify the petition. In re Rosen-fields, 11 N. B. R. 86; 3 Amer. Law Rec. 724; 1 Cent. Law J. 583; Fed. Cas. 12,061.

121. If the name of a petitioner in the body of a petition is omitted from the verification, the petition is imperfect. *Id.*

122. Under section 43 of the act of 1867 as amended, although the verification of the petition is defective, a case is pending in bankruptcy so that a composition may be proposed and effected. *Ex parte Jewett*, *In re Morris*, 11 N. B. R. 443; 2 Lowell, 393; 12 N. B. R. 170; Fed. Cas. 7,303.

123. Where a petition is verified by an attorney, the non-residence of his principal should be alleged directly and not by way of recital. *In re Hadley*, 12 N. B. R. 366; Fed. Cas. 5,894.

124. The affidavit to a petition, if defective in form, may be amended so as to conform to law. *In re Sargent*, 13 N. B. R. 144; 1 N. Y. Wkly. Dig. 435; Fed. Cas. 12,361.

125. Upon a petition by a corporation a verification by an agent not an officer of the corporation is sufficient, but the authority of the agent must be set forth in the affidavit or otherwise established. *In re Hanibel et al.*, 15 N. B. R. 283; 9 Chi. Leg. News, 165; 15 Alb. Law J. 271; 24 Pittsb. Leg. J. 152; Fed. Cas. 6,023.

126. A petition for involuntary bankruptcy against a firm, signed by one creditor of the firm and another who is an individual creditor of a member of the firm, is sufficient. *In re Matot et al.*, 16 N. B. R. 485; 5 N. Y. Wkly. Dig. 529; Fed. Cas. 9,232.

## IX. AMENDMENT.

See PROOF OF CLAIMS, 15, 30.

127. When in an involuntary case the petitioners failed to subscribe the affidavit to the petition, *held*, that the petition was defective, and as the petition was not a petition in *propria forma*, and could not be amended, such defect was incurable. *In re Moore et al. v. Harley*, 4 N. B. R. 71; 2 Balt. Law Trans. 666; Fed. Cas. 9,764.

128. Where, on the trial, petitioning creditors obtained leave to amend their petition, to the granting of which leave the respondent objected and excepted, *held*, that such permission to amend was not error. *Hardy et al. v. Binger et al.*, 4 N. B. R. 77; Fed. Cas. 6,057.

129. The amendment to the bankrupt law

approved June 22, 1874, was retrospective as to pending cases where there had been no adjudication. It allowed the amendment of a petition to relate back to the commencement of the proceedings in bankruptcy. *In re Williams & McPheeters*, 11 N. B. R. 145; 6 Biss. 233; 7 Chi. Leg. News, 49; Fed. Cas. 17,700.

130. When a petition is defective as to the requisite number in value and amount of creditors, by reason of the fact that creditors are included whose claims are for less than \$250, but it appears that those properly included constitute a sufficient number in value and amount, the petition may be amended (act 1867). *In re McKibben*, 12 N. B. R. 97; Fed. Cas. 8,839.

131. A voluntary bankrupt who, after considerable delay, desires to amend his petition in matters affecting the jurisdiction of the court, should state in his application why his petition was not originally in proper form, and why he did not apply sooner, and should file with his application an affidavit that the facts necessary to give jurisdiction under the statute existed at the time the petition was filed; and he should state specifically what words he desires to strike out and what to insert. *In re Wood*, 13 N. B. R. 96; 6 Ben. 339; 1 N. Y. Wkly. Dig. 366; Fed. Cas. 17,935.

132. An involuntary petition cannot be amended by adding a new party after all the testimony has been taken and the case is on hearing before the court. *In re Pitt et al.*, 14 N. B. R. 59; 3 Ben. 389; 23 Pittsb. Leg. J. 196; Fed. Cas. 11,188.

133. Several of the creditors signing the petition, as appeared from the schedule, had claims amounting to less than \$250; and it did not appear from the petition that the officer signing for a bank had authority to act for the bank. *Held* to be defects, but that the court had jurisdiction to allow amendment. *In re Roche et al. v. Fox*, 16 N. B. R. 461; Fed. Cas. 11,974.

## X. EFFECT.

134. The lien of a mechanic or materialman is not dissolved by his filing a petition for the benefit of the bankrupt law; nor will the jurisdiction of the state court over such

lien be interfered with by the bankrupt court. In re Clifton et al. v. Foster et al., Ass. 8 N. B. R. 162.

135. In cases of voluntary bankruptcy, the law adjudges the petitioner a bankrupt immediately on the filing of the petition, and a warrant against his property immediately issues. *Maxwell v. Faxton*, 4 N. B. R. 60.

136. After the filing of a petition in involuntary bankruptcy, no person can acquire any interest by a receivership created by a state court, or otherwise, in the property of the debtor, which the decree in bankruptcy will not displace or override. *Smith v. Buchanan et al.*, 4 N. B. R. 133; 8 Blatchf. 153; 8 Alb. Law J. 97; Fed. Cas. 13,016.

137. In voluntary petitions in bankruptcy, the filing of the petition terminates the right of the bankrupt to the disposal of his property; while in involuntary petitions, such right ceased upon adjudication. In re Dillard, 9 N. B. R. 8; 2 Hughes, 190; 6 Amer. Law T. Rep. 490; 21 Pittsb. Leg. J. 82; Fed. Cas. 8,912.

138. It is not the filing of every petition in bankruptcy that is deemed a commencement of proceedings, but the filing of a petition upon which an order of adjudication may be made by the court. In re Rogers, 10 N. B. R. 444; 1 Cent. Law J. 470; Fed. Cas. 12,003.

139. A petition in bankruptcy is an action or suit, and an adjudication thereon is a final judgment which it is beyond the power of congress to annul or set aside. In re Comstock & Co., 10 N. B. R. 451; 3 Sawy. 128; 6 Chi. Leg. News, 413; 22 Pittsb. Leg. J. 25; Fed. Cas. 3,077.

140. Where the court has adjudged that the requisite proportion of creditors has joined in an involuntary petition, the judgment is final, and will not be re-examined by the district court except upon an allegation of fraud or bad faith; no inquiry can be made into the truth of affidavits tending to show that the requisite proportion of creditors has not united in the petition unless fraud or bad faith is alleged. In re Duncan et al., 14 N. B. R. 18; 8 Ben. 365; Fed. Cas. 4,131.

141. In the case of one who has been adjudicated a bankrupt on his own petition, the adjudication cannot be assailed by proof that

he was not, in fact, insolvent. In re Atl. Mut. Life Ins. Co., 16 N. B. R. 541; 9 Ben. 270; 16 Alb. Law J. 453; 24 Int. Rev. Rec. 13; Fed. Cas. 628.

142. A decree of bankruptcy against several persons as members of one firm is no bar to proceedings against them with others as members of another firm. In re Jewett & Co., 16 N. B. R. 48; 7 Biss. 473; 4 N. Y. Wkly. Dig. 494; 9 Chi. Leg. News, 345; 4 Law & Eq. Rep. 77; 23 Int. Rev. Rec. 232; Fed. Cas. 7,307.

143. Petition was procured by bankrupts themselves as an involuntary one to avoid the necessity of procuring the assent of the requisite number of creditors, representing the required amount of indebtedness. The petition was signed by the necessary number of creditors. *Held*, that the adjudication should not be set aside. In re Matot et al., 16 N. B. R. 485; 5 N. Y. Wkly. Dig. 529; Fed. Cas. 9,282.

144. Objection was made to the discharge of the bankrupt on the ground that petition was filed by collusion between bankrupt and petitioning creditors. *Held*, that in the absence of fraud, original adjudication was conclusive on all creditors and could not be disputed upon question of granting a discharge. In re Ordway Bros., 19 N. B. R. 171; 19 Alb. Law J. 482; Fed. Cas. 10,552.

## XI. WITHDRAWAL FROM.

### See COURTS, 12.

145. In the course of the hearing, respondent paid into court, in pursuance of a tender made the day before, the amount due one of the petitioners, and professed a readiness to pay the other. *Held*, that it could not defeat the petition, there being other creditors. In re Williams, 3 N. B. R. 74; 1 Lowell, 406; Fed. Cas. 17,703.

146. A petitioning creditor may, at any time before adjudication, discontinue the proceedings and have his petition dismissed without notice to other creditors, who, if they desire to continue proceedings, should apply on the day to which proceedings have been adjourned for leave to be substituted or file a new petition. In re The Camden R. M. Co., 3 N. B. R. 146; Fed. Cas. 2,338.

147. A petition was filed before the pas-

sage of amendment of June 25, 1874, requiring representations in number and amount of creditors. Certain creditors asked to withdraw from petition and have case dismissed as to them, thus leaving less than the requisite number. *Held*, that they should not be allowed to do so unless all unite and agree to dismiss. *In re Heffron*, 10 N. B. R. 213; 6 Biss. 156; 6 Chi. Leg. News, 358; Fed. Cas. 6,321.

148. When the name of a petitioner has been signed to the petition he cannot withdraw it for the purpose of defeating the petition, but if his name were signed without his knowledge he may repudiate the proceedings and the petition will be dismissed as to him. *In re Rosenfields*, 11 N. B. R. 86; 8 Amer. Law Rec. 724; 1 Cent. Law J. 538; Fed. Cas. 12,061.

149. If a creditor joins in a petition upon misrepresentation, he may be allowed to withdraw any time before adjudication. *In re Sargent*, 13 N. B. R. 144; 1 N. Y. Wkly. Dig. 435; Fed. Cas. 12,361.

150. A creditor will not be entitled to withdraw from a petition because he was induced to join in it by a misrepresentation of one of the debtors, and especially if the misrepresentation was not substantial or intentionally false. *In re Vogel et al.*, 18 N. B. R. 165; 9 Ben. 498; Fed. Cas. 16,981.

## XII. SECOND PETITION.

151. Where creditors petition court to declare S. a bankrupt, S. admitting allegations, save fraud, but, before return day, himself filed voluntary petition and was adjudicated by register, *held*, the petition of voluntary bankruptcy was of no effect, and S. adjudicated a bankrupt under petition filed by creditors. *In re Stewart*, 3 N. B. R. 28; Fed. Cas. 13,419.

152. Where an adjudication has been made on a voluntary petition and a warrant has issued for the first meeting of creditors, and the matter of said petition is still pending without any discharge or discontinuance, and the bankrupt files a second petition in which the same debts and the same creditors are named, the choice of an assignee will not be made in the second proceeding pending the first, and an order will be made stay-

ing the proceedings under the second petition. *In re Wielarske*, 4 N. B. R. 180; 4 Ben. 468; Fed. Cas. 17,619.

153. A voluntary bankrupt who has contracted new debts since the filing of a petition in bankruptcy under which a discharge was refused may file a new petition. *In re Drisko*, 13 N. B. R. 112; 2 Lowell, 430; Fed. Cas. 4,090.

154. If a party has contracted new debts since the filing of the first petition, he may file a second petition in bankruptcy. *In re Drisco et al.*, 14 N. B. R. 551; Fed. Cas. 4,036.

## XIII. FOR INJUNCTION.

155. Before the appointment of assignee, a petition for an injunction can be filed only by the bankrupt. After assignees are appointed, the petition should be filed by them. *In re Bowie*, 1 N. B. R. 185; 15 Pittsb. Leg. J. 448; 1 Amer. Law T. Rep. Bankr. 97; Fed. Cas. 1,728.

156. Where a petition for adjudication contains a prayer for an injunction restraining the bankrupt from paying out money, which is granted, the injunction falls when the debtor is adjudged bankrupt. *In re Kintzing*, 8 N. B. R. 52; Fed. Cas. 7,833.

157. Petitioning creditors filed petition to adjudicate K. a bankrupt, alleging suspension of payment on his commercial paper, and also that K. had made a general assignment to F. with the intention of defeating the provisions of the bankruptcy act, and praying an injunction against P. from making any payments. The court ordered P. to make no payments whatever until ordered to do so by the court. *Id.*

## XIV. INTERVENING.

See COURTS, 111.

158. Another creditor may intervene and be permitted to prosecute the original petition where the court is satisfied that the original petitioning creditor does not intend to prosecute the matter further, and the pending application of the original creditor to discontinue the proceedings is sufficient evidence in that regard. *In re Buchanan*, 10 N. B. R. 97; Fed. Cas. 2,073.

159. The words "such petition" in the

forty-second section of the act of 1867 refer to the prior part of that section, and also to the two preceding sections, and mean the petition of the original petitioning creditor and not the petition of the intervening creditor. In re Lacey, Downs & Co., 10 N. B. R. 477; 12 Blatchf. 322; Fed. Cas. 7,965.

## XV. IN GENERAL.

See DISCHARGE, 10, 11, 72, 164.

160. The clerk of the court will not file a petition where the chirography is so illegible as to be not deciphered with certainty. Anon., 3 N. B. R. 15.

161. A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment. In re Fuller, 4 N. B. R. 29; 1 Sawy. 243; 18 Pittsb. Leg. J. 82; 2 Chi. Leg. News, 875; Fed. Cas. 5,148.

162. A petition in involuntary bankruptcy is not a mere suit *inter partes*, but rather partakes of the nature of a proceeding *in rem* in which any actual creditor has a direct interest. In re Boston, H. & E. R. R. Co., 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

163. An assignee petitioned the district court to require that certain books, claimed both by him and by an assignee of the bankrupt's own choosing, be delivered to him. *Held*, he should proceed either at law or in equity. Rogers v. Winsor, 6 N. B. R. 246; Fed. Cas. 12,023.

164. A contract by a creditor to refrain from instituting bankruptcy proceedings against a debtor is void for want of consideration where for any reason the creditor has no right to institute such proceedings. Ecker v. McAllister, 17 N. B. R. 42.

165. The bankrupt act of 1867 did not forbid a creditor to contract with a third party to refrain from instituting proceedings against the debtor. *Id*.

166. An employee may prove his claim for damages for a breach of contract caused by the filing of a voluntary petition in bankruptcy by his employer. *Ex parte* Pollard, 17 N. B. R. 228; 2 Lowell, 411; Fed. Cas. 11,252.

167. Where fraud is practiced by some of co-petitioners in the name of all, unless the

innocence of the others appears clearly they cannot be held innocent of the fraud. In re Keiler, 18 N. B. R. 10; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 7,647.

## PERISHABLE PROPERTY.

1. Sale of perishable property for benefit of all concerned cannot be ordered until it is in the possession of the marshal as messenger. In re Metzler et al., 1 N. B. R. (8 vo. ed.) 39; 1 Ben. 356; Bankr. Reg. Supp. 9; Fed. Cas. 9,512.

2. The assignee must apply to the court by petition if he desires to have property sold as perishable. In re Graves, 1 N. B. R. 19; 2 Ben. 100; Fed. Cas. 5,709.

## PLACE OF BUSINESS.

### I. DOMICILE.

(a) *Residence.*

(b) *Carrying on Business.*

(c) *Return to.*

### II. PARTNERS — PLACE OF BUSINESS.

See EXEMPTIONS, 26; LIMITATIONS, STATUTE OF, 3; PETITIONS, 109; TRUSTEE, 151.

### I. DOMICILE.

(a) *Residence.*

1. The word "residence" in section 11 of the bankrupt act of 1867 is not synonymous with "domicile," and where a person, resident with his family in one place, buys a stock of goods in another, and goes there for business, leaving his family in the former place, the petition in bankruptcy is properly filed in the place where he carries on such business. In re Watson, 4 N. B. R. 197; Fed. Cas. 17,272.

2. An alien, resident within the United States, need not have resided for a period of six months within the district in which application for adjudication of bankruptcy is made. In re Goodfellow, 8 N. B. R. 114; 1 Lowell, 510; Fed. Cas. 5,536.

3. Neither the actual nor alleged residence or place of business of the bankrupt can be directly made the ground of opposition to his discharge. In re Burk, 8 N. B. R. 76;



Deady, 425; 2 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 2,156.

4. I and P. having been adjudged bankrupts applied for a discharge. Court allowed one B., a creditor, to file objections, one of which was that bankrupts were not *bona fide* residents for six months prior to filing of petition. *Held*, that while decree remains in force, bankrupt's discharge cannot be opposed on grounds that allegations in petition as to residence are not true. In re Ives et al., 19 N. B. R. 97; 5 Dill 146; Fed. Cas. 7,115.

5. A court is without jurisdiction to entertain an application for discharge if the bankrupt did not reside or carry on business in the district where the petition was filed for six months immediately preceding the time of filing or for the longest period during such six months. In re Leighton, 5 N. B. R. 95; 4 Ben. 457; Fed. Cas. 8,221.

6. Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged; and subsequently another creditor moved the court to dismiss the proceeding on the ground that the bankrupts had never resided or carried on business in this state, *held*, that the court was without jurisdiction and that the proceedings should be vacated and set aside. In re Fogerty et al., 4 N. B. R. 148; 1 Sawy. 233; 5 Amer. Law Rev. 163; Fed. Cas. 4,895.

### (b) *Carrying on Business.*

7. The petitioner resided in New Jersey and was employed in a commercial house in New York city. The petition in bankruptcy was filed in the district court for the southern district of New York. It was held to have been filed in the wrong district. In re Magie, 1 N. B. R. 153.

8. Bills were issued by Glyn, in Boston, on London. They were indorsed in blank by Glyn in Boston, and negotiated by his agent in New York, who filled out the indorsement. The bills were accepted, but afterwards protested for non-payment. The question arose as to what law governed in determining damages and interest. *Held*, that they were governed by the law of Massachusetts where the bills were drawn. In re Glyn, Ex parte Heidelbach, 15 N. B. R. 495.

9. The fact that a person has an office at which he receives mail and settles up the old business of an insolvent firm of manufacturers of which he was a member, and which has ceased business as manufacturers, is not sufficient to sustain an allegation of carrying on business within the jurisdiction of a particular bankruptcy court. In re Little, 2 N. B. R. 97; 3 Ben. 25; 1 Chi. Leg. News, 123; Fed. Cas. 8,391.

10. The petition must be addressed to the judge of the district in which such debtor has resided or carried on his business for the six months next immediately preceding the time of filing his petition. In re Magie, 1 N. B. R. 138; 2 Ben. 369; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 8,951.

11. A petitioner in bankruptcy had carried on business and resided in New York for twenty years prior to June, 1866, and removed to New Jersey that year. His petition was filed in the district court for the southern district of New York. It was held to be properly filed. In re Belcher, 1 N. B. R. 202; 2 Ben. 468; Fed. Cas. 1,237.

### (c) *Return to Domicile.*

12. Where a bankrupt born in one state becomes domiciled in another, but leaves it with no intention of returning, and returns to his native state, and shortly thereafter files his application in bankruptcy, the act of leaving the former domicile with no intention of returning, at once revives the domicile of origin. In re Wiggin, 1 N. B. R. 90; 1 Lowell, 237; Fed. Cas. 17,061.

13. Upon petition by a creditor to vacate proceedings for lack of jurisdiction, it appeared that the bankrupt was born in Boston, and afterwards became domiciled in California, but left that state with no intention of returning, and, after several months' residence outside the United States, returned to Boston, and within two months filed his petition in bankruptcy. It was held that the debtor was a resident of Boston during the whole of the six months next preceding the filing of the petition. *Id.*

## II. PARTNERS—PLACE OF BUSINESS.

14. A bankrupt who was a member of a firm which had failed kept an office in New York while residing in an adjoining state,

for the purpose of settling up the business of the firm. *Held*, that he was not conducting business within the meaning of the act (1867). In re Little, 2 N. B. R. 97; 8 Ben. 25; 1 Chi. Leg. News, 123; Fed. Cas. 8,891.

15. A firm can only be sued in their domicile and place of business. Cameron v. Canio & Co., 9 N. B. R. 527; Fed. Cas. 2,840.

## PLEADING AND PRACTICE.

- I. ADJUDICATION.
- II. CLAIMS.
- III. COMPOSITION.
- IV. CRIMES AND OFFENSES.
- V. DISCHARGE.
  - (a) *In General.*
  - (b) *Objections to Discharge.*
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- VI. DISMISSAL AND DISCONTINUANCE.
- VII. DIVIDEND.
- VIII. EVIDENCE.
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- IX. FRAUDULENT CONVEYANCES.
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- XI. PARTNERS.
- XII. PETITIONS IN BANKRUPTCY.
  - (a) *In General.*
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- XIII. REFEREE OR TRUSTEE.
  - (a) *In General.*
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  - (c) *Petitions or Suits of.*
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- XIV. SECURITIES.
- XV. UNITED STATES AND STATE COURTS.
  - (a) *In General.*
  - (b) *Appeals and Writs of Error.*
  - (c) *Demurrer.*
  - (d) *Injunction.*
  - (e) *Jury.*
  - (f) *Parties.*
  - (g) *Plea and Answer.*
  - (h) *Process and Service.*

See ATTACHMENT; CORPORATIONS, 43, 44; COURTS, I; DEATH, 1-6; DEFINITION, 19; ESTATES, 155; ESTOPPEL, 18; EXAMINA-

TION OF BANKRUPT, 6, 30, 33; EXEMPTIONS, 10, 75, 105; JUDGMENT, 3, 26, 62; LIEN, 2; LIMITATIONS, STATUTE OF, 1, 58; MORTGAGES, 64, 68, 71; PROOF OF CLAIMS, 7, 16, 42; PREFERENCES, 18, 184; RECEIVER, 12; REFEREE, 27; SALE, 4; STAY OF PROCEEDINGS, 25; SURETY, 14; TAX TITLE, 4.

## I. ADJUDICATION.

1. A decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem*; and in case the court rendering it has jurisdiction, it is only assailable by a direct proceeding in a competent court, if due notice be given and the adjudication is correct in form. Michaels et al. v. Post, Ass., 12 N. B. R. 152; 21 Wall. 398.

2. Manufacturers had their property attached, and afterwards another creditor petitioned court for adjudication in bankruptcy and marshal took possession of attached estate. Defendant demanded jury trial. Before trial, the attaching creditor bought claim of creditor and with it agreement that proceedings should be discontinued. Another creditor intervened and asked that proceedings be stayed and adjudication be had. *Held*, that adjudication was not discontinued, and that it is not within the power of the petitioning creditor or the bankrupt to defeat such intervention by any arrangements between themselves, and any action of the court which defeats such right is in violation of the statute. In re Lacy et al., 10 N. B. R. 477; 12 Blatch. 322; Fed. Cas. 7,965.

3. An attaching creditor should be allowed to intervene and oppose an adjudication in bankruptcy. In re Jack, 13 N. B. R. 296; 4 Amer. Law Rec. 453; 1 Woods, 549; Fed. Cas. 7,119.

4. An attachment creditor may move to set aside an adjudication of bankruptcy, though not a party to the proceedings. In re Bergeron, 12 N. B. R. 385; 2 Cent. Law J. 507; 1 N. Y. Wkly. Dig. 178; Fed. Cas. 1,342.

5. It is competent for a corporation against whom a petition was filed, where the attorney for such corporation appeared and gave any waiver of time and admitted the charge brought against it, to appear within a reasonable time and move the court to have the proceedings set aside; but where a bankrupt

has delayed six months after the adjudication, and when the court is engaged upon the administration of the assets, such motion comes too late. *In re Republic Ins. Co.*, 8 N. B. R. 817; Fed. Cas. 11,706.

## II. CLAIMS.

6. When a creditor objects to the postponement of his claim, he should have the question certified before any further action transpires before the register. *In re Jackson et al.*, 14 N. B. R. 449; 7 Biss. 290; Fed. Cas. 7,123.

7. The register may postpone a claim at first meeting if he finds its validity doubtful, but he has no power to postpone a claim which he considers valid, but must report it to court if it could affect choice of assignee. *In re Bartusch*, 9 N. B. R. 478; Fed. Cas. 1,086.

8. Where assignee in bankruptcy is not satisfied with the legality of a claim filed with him, he may move to have it expunged under rule 34 (act of 1867). *In re Fireman's Ins. Co.*, 8 N. B. R. 123; 8 Biss. 462; 5 Chi. Leg. News, 265; Fed. Cas. 4,796.

9. G. obtained judgment on notes against K. Bros. and S. K. Bros. were subsequently adjudged bankrupts, and G. proved against their estate. On motion to expunge, *held*, that defense of usury is a personal one, and such defense is not open to assignee. *In re Kitzinger et al.*, 19 N. B. R. 152; Fed. Cas. 7,861.

10. A bill in equity is defective that alleges a claim to be illegal and to have been fraudulently proved, in general terms, without specifying wherein the illegality or fraud consists. *First Nat. Bank v. Cooper et al.*, 9 N. B. R. 529; 20 Wall. 171.

11. The proper mode of presenting to the court the question of the right of secured creditors who have offered proofs of debt to participate in a dividend and vote at a creditors' meeting is by motion of the assignee to expunge the proofs of debt. *In re Jaycox et al.*, 7 N. B. R. 808; 7 West. Jur. 18; Fed. Cas. 7,240.

12. Where a creditor reduces his claim to bring it within the jurisdiction of a justice of the peace, he is clearly barred from maintaining another action on the same claim,

even though his judgment was for less than was due. *Witt, Ass. v. Hereth*, 18 N. B. R. 106; 6 Biss. 474; 8 Chi. Leg. News, 41; 1 N. Y. Wkly. Dig. 436; Fed. Cas. 17,921.

13. A creditor filed his petition to have the debtor declared a bankrupt. The debtor appeared and demanded a trial by jury. *Held*, that the creditor must establish his debt before proceeding to show acts of bankruptcy. *Brock v. Hoppock*, 2 N. B. R. 2; Fed. Cas. 1,912.

## III. COMPOSITION.

See COMPOSITION.

14. Where notes given for composition settlement fall due pending the hearing on a petition to review an order confirming the composition, the amount of the note should be paid into court, in order to relieve the bankrupt from liability. *In re Reynolds*, 16 N. B. R. 176; 5 N. Y. Wkly. Dig. 51; Fed. Cas. 11,725.

15. If a debtor, after the adoption of a resolution of composition, omit to plead the same, he may not obtain relief against a judgment by injunction from district court. *In re Tooker*, 14 N. B. R. 85; 8 Ben. 890; 23 Pittsb. Leg. J. 185, 196; Fed. Cas. 14,096.

## IV. CRIMES AND OFFENSES.

16. In an indictment under the bankrupt act of 1867, it is not sufficient either as to the proceedings or the jurisdiction of the court to rely upon a general averment. All matters necessary to constitute the offense must be pleaded. The description of goods should be as definite as in a declaration in trover. Figures should not be used for dates; and the word "feloniously" should be omitted, as the offenses are misdemeanors. *United States v. Prescott*, 4 N. B. R. 29; 18 Pittsb. Leg. J. 21; Fed. Cas. 16,094.

17. Indictment against trader for obtaining goods under false pretenses did not charge that the goods were obtained with intent to defraud creditors, nor was there an averment that the accused was not, in fact, dealing in the ordinary course of trade when he obtained the goods. *Held*, not defective. *United States v. Myers*, 16 N. B. R. 387; Fed. Cas. 15,848.

## V. DISCHARGE.

See DISCHARGE, XVIII.

(a) *In General.*

18. A final disposition of a cause in bankruptcy may take place, although no application for a discharge has been made and no action of the court had upon the subject. In *re Brightman et al.*, 15 N. B. R. 218, 215; 14 Blatchf. 180; Fed. Cas. 1,878.

19. Application for leave to commence a suit against a bankrupt will be entertained and leave granted to begin an action for a debt to which the bankrupt's discharge would not be a bar, if it appears that if not commenced forthwith the statute of limitations might run against it, or that service might not be obtained, or that testimony might be lost; and the court will then stay the suit to await the determination of the question of the bankrupt's discharge or the expiration of a reasonable time to make application therefor. In *re Ghirardelli*, 4 N. B. R. 42; 1 Sawy. 343; Fed. Cas. 5,376.

20. A cross-bill which sets up a discharge in bankruptcy, and does not name the assignee as a party, is not defective, four years having elapsed since his appointment and his final settlement. *Phelps et al. v. Curtis et al.*, 16 N. B. R. 85.

21. Where a conveyance of property concealed by a bankrupt before his discharge, made by the bankrupt after his discharge, is sought to be set aside by an assignee, his suit is not a proceeding to annul the bankrupt's discharge, and may be brought in the circuit court. *Nicholas, Ass. v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

22. In an attachment suit, the defendant, after answering, filed a petition in bankruptcy, and suggested bankruptcy on the records of the state court, and asked a continuance. Judgment rendered for plaintiffs. Defendants were discharged in bankruptcy, and brought a suit for review to reverse the judgment. *Held*, that it was within the discretion of the court to grant the review. *Todd et al. v. Barton et al.*, 13 N. B. R. 197.

23. An order and summons were issued requiring a bankrupt who had been discharged to appear and be examined. An

objection by the bankrupt that such order and summons were unauthorized by law, held to be not well taken. In *re Dole*, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,965.

(b) *Objections to Discharge.*

24. Charges, in general terms, of the destruction and removal of books and papers to defraud creditors, and procurement of certain creditors' assent by pecuniary consideration, held too vague. In *re Freeman*, 4 N. B. R. 17; 4 Ben. 245; Fed. Cas. 5,082.

25. On filing specification of opposition to bankrupt's discharge the hearing is at once transferred into court, and there cannot be any examination of bankrupt before the register on application for discharge. In *re Frizzelle*, 5 N. B. R. 119; Fed. Cas. 5,132.

26. The strictness of common-law pleading is not required in creditor's specification in opposition to discharge, but the bankrupt is entitled to notice as to what is expected to be proven against him. In *re Smith et al.*, 5 N. B. R. 20; Fed. Cas. 12,985.

27. In opposing discharge the facts relied on must be stated in the specifications filed without requiring reference to other parts of the record. In *re Eidom*, 3 N. B. R. 27; Fed. Cas. 4,814.

28. A creditor who had proved his debt can file specifications of objections to the discharge at any time before the period fixed by General Order 34 under the act of 1867. In *re Baum*, 1 N. B. R. (8 vo. ed.) 5.

29. A creditor opposing a discharge of bankrupt on ground of fraud must set forth the same with reasonable definiteness. In *re Rathbone*, 1 N. B. R. 50; 2 Ben. 133; 15 Pittsb. Leg. J. 233; Fed. Cas. 11,580.

30. An adjournment of the examination of bankrupt operates as an enlargement of the time of examination necessarily. Specifications of grounds for opposition to discharge on grounds of fraud must not be general and vague. In *re Mawson*, 1 N. B. R. 41, 115.

31. After answer filed to bill to set aside a conveyance made by a bankrupt prior to adjudication, complainants served notice on defendant that bankrupt's discharge would be attacked on the ground of fraud in obtaining it. *Held*, that it could not be put in

issue by such notice. *Hudson v. Bingham*, 8 N. B. R. 494.

32. A material fact involved in the decision of a case in the chancery court cannot be put in issue upon a notice given to a party that such fact will be contested on the hearing of the cause. *Id.*

33. An adjournment, without day, of the proceedings under a petition for discharge terminates those proceedings as far as action under the order to show cause is concerned. The time to examine witnesses does not expire by the bankrupt filing petition for discharge. The time to file objections can be kept open by adjourning to any day which may be fixed for showing cause until a reasonable time has elapsed for the examination of witnesses. In *re Seckendorf*, 1 N. B. R. 185; 2 Ben. 462; 15 Pittsb. Leg. J. 450; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 12,600.

34. A., counsel for opposing creditors to the discharge of bankrupt, after several adjournments to rule to show cause why bankrupt should not be discharged, entered his appearance on an adjourned day, which was attacked on ground that appearance should have been entered on day to show cause. *Held*, that appearance is sufficient if entered on the adjourned day, but specifications must be filed within ten days thereafter. In *re Seabury*, 10 N. B. R. 90; Fed. Cas. 12,573.

35. On motion to vacate a discharge, *held*, that new trial of specifications is not authorized by Revised Statutes, section 5120, after discharge has been granted, even if opposing creditor can adduce new facts. In *re Corwin*, 19 N. B. R. 422; Fed. Cas. 3,259.

36. A specification in opposition to discharge must allege wilful false swearing as well as wilful omission from the schedule. In *re Keefer*, 4 N. B. R. 127; 8 Chi. Leg. News, 125; Fed. Cas. 7,638.

37. Specifications in opposition to discharge were filed by a creditor who had obtained judgment against the bankrupt pending proceedings in bankruptcy. On motion to dismiss, *held*, that the judgment creditor had an interest which entitled him to be heard. In *re Stansfield*, 16 N. B. R. 268; 4 Sawy. 334; Fed. Cas. 13,294.

38. Bankrupt filed petition for discharge without assent of creditors, his assets not

equaling thirty per cent. Action was suspended to allow assent of creditors to be procured. Subsequently bankrupt asked leave to file proof of debts and assent of other creditors. *Held*, that petition must be submitted on case existing on return day, and leave to file said proofs refused (act of 1867). In *re Seaman*, 19 N. B. R. 332; Fed. Cas. 12,580.

39. An allegation in opposition to a bankrupt's discharge, that he has concealed his property for the purpose of defrauding his creditors, is bad. Unless all the property is meant, it should specify what property; and if all is meant, the time, place and circumstances should be specified. In *re Beardsley*, 1 N. B. R. 52; 1 Amer. Law T. Rep. Bankr. 46; Fed. Cas. 1,183.

40. If there be an omission to enter an order refusing a discharge, the bankrupt court may make it *nunc pro tunc*, if no rights of third persons have intervened which can be thereby prejudiced. In *re Drisco et al.*, 14 N. B. R. 551; Fed. Cas. 4,086.

41. Matter intended to avoid a discharge should be replied to the plea, and not be set forth in the declaration. *Brown et al. v. Broach et al.*, 16 N. B. R. 296.

41a. Where the court has sustained specifications in opposition to discharge in certain respects, it must be deemed to have disallowed them in all other respects, and they cannot afterwards be renewed unless the amendment allowed is, in effect, the making of a specification substantially different from the former one. In *re Duncan et al.*, 18 N. B. R. 42; Fed. Cas. 4,133.

### (c) *Plea of Discharge.*

42. A discharge may be pleaded by simple averment of the facts in an action to enjoin collection of a judgment on the ground of discharge, and a copy of the discharge need not be set out. *Hayes v. Ford*, 15 N. B. R. 569.

43. A replication that the defendant had fraudulently withheld certain property from his schedule of assets cannot avoid a plea of discharge in bankruptcy. *Stevens v. Brown*, 11 N. B. R. 568.

44. A discharge in bankruptcy may be pleaded in bar of an action for purchase

price of land assigned as a homestead. *Hoskins v. Wall*, 17 N. B. R. 314.

45. Claim for damages for wrongful conversion of personal property is provable, and a discharge would release the bankrupt from such a claim. Hence plea of discharge is a complete bar in a suit in a state court. *Cole v. Roach*, 10 N. B. R. 288.

46. Sureties on an appeal bond, executed in an appeal from a justice of the peace to the circuit court, were discharged in bankruptcy, after they executed the appeal bond and before trial in the circuit court, which resulted in a recovery against the principal. By the law of the state a judgment against the sureties follows upon rendition of judgment against the principal. *Held*, that the discharge should have been set up as a defense before judgment in the circuit court. *Jones et al. v. Coker et al.*, 16 N. B. R. 343.

47. When a discharge in bankruptcy is pleaded, the court must submit the issue to a jury. *Austin v. Markham*, 10 N. B. R. 548.

48. In an action in *assumpsit* to which defendant pleaded a discharge in bankruptcy, plaintiff replied that the debt was created by fraud. *Held*, a good replication. *Stewart v. Emerson*, 8 N. B. R. 462.

49. Creditors of a bankrupt brought an action to set aside a fraudulent transfer. The defendants did not plead that the title passed to the assignee in bankruptcy, but undertook to introduce evidence of that fact by showing his appointment and the assignment to him. They only pleaded discharge. *Held*, that such pleading was insufficient, and such evidence could only be admitted as tending to show a discharge. *Dewey v. Moyer*, 18 N. B. R. 114.

50. On a continuous contract, where liability is incurred from day to day, a discharge cannot be pleaded as a bar to any part of liability incurred after the date of commencement of proceedings. *Robinson et al. v. Pesant et al.*, 8 N. B. R. 426.

51. A discharge in bankruptcy is not sufficient defense in an action to set aside a fraudulent conveyance pending at the time of filing the petition, the assignee not having interfered and the claim of the creditor not having been proved in the proceedings. *Phelps et al. v. Curtis et al.*, 16 N. B. R. 85.

52. An answer set up a discharge in bank-

ruptcy and objection was made on ground that claimant's name had been omitted from schedules. *Held*, discharge was sufficiently pleaded and was admitted by replication. *Payne et al. v. Abel et al.*, 4 N. B. R. 67.

53. A plea of a discharge which does not set forth a copy of the discharge is bad. A plea is bad unless it aver what court adjudged the defendant to be a bankrupt, or granted his discharge, or set out the facts upon which any court would acquire jurisdiction so to do. Such plea should conclude with a verification. If defective, it could be amended. *Stoll v. Wilson*, 14 N. B. R. 571.

54. A plea setting up a discharge, if a plea in abatement, is bad if not sworn to. If such plea is in bar, when the notes sued upon were given after bankruptcy, it is insufficient. *Beeson et al. v. Howard*, 11 N. B. R. 486.

55. A bankrupt will not be allowed to file an answer setting up his discharge, where an attachment issued more than four months prior to the institution of bankruptcy proceedings was dissolved by filing a bond. *Holyoke et al. v. Adams et al.*, 13 N. B. R. 413.

55a. A certificate of discharge duly pleaded in an action in the supreme judicial court of Maine will not, by virtue of the Revised Statutes of 1857, chapter 81, section 33, dissolve an attachment made by virtue of the writ in the action, more than four months prior to the defendant's commencement of proceedings in bankruptcy. Such attachment may be enforced by an execution issued upon a special judgment rendered by the court in which the action was entered and prosecuted. The United States district court does not have exclusive jurisdiction in such matters. *Leighton v. Kelsey et al.*, 4 N. B. R. 155.

## VI. DISMISSAL AND DISCONTINUANCE.

56. Where a plaintiff in a pending action is adjudged a bankrupt, it is not proper to enter a nonsuit, but the case should be dismissed upon the assignee's failure to appear after notice. *Towle v. Davenport*, 16 N. B. R. 478.

57. The proper practice, where all creditors except a few minor ones desire dismissal of proceedings, is to require deposit of secu-

urity for payment of minor claims until settled in highest court possible to take them to. In re Indianapolis, Cin. & L. R. R. Co. 8 N. B. R. 302; 5 Biss. 287; 2 Pittsb. Leg. J. 4; Fed. Cas. 7,023.

58. The proper remedy for a creditor who seeks to have a judgment against a bankrupt paid by the assignee is by petition, signed and verified, filed in the bankrupt matter. In re Smith, 2 N. B. R. 98; 1 Chi. Leg. News, 123; Fed. Cas. 12,984.

59. A complaint being defective in form but not in substance, a motion for nonsuit will be overruled. Merritt v. Glidden et al., 5 N. B. R. 157.

60. If an attorney holding an assignment of a policy of insurance, as security for his fees, dismisses a suit thereon, and all the parties know at the time of the bankruptcy of the plaintiff, the entry will be stricken out on the motion of the assignee, although the motion is not made until a subsequent term. Home Ins. Co. v. Hollis, Ass., 14 N. B. R. 337.

61. A motion to dismiss the proceedings and to settle with the debtor comes too late if filed after the debtor has been adjudged a bankrupt. In re Sherburne, 1 N. B. R. 155; Fed. Cas. 12,758.

62. Where all the creditors of a bankrupt petition the court to dismiss the proceedings, and no assignee has been chosen, the court has power to grant the petition. In re Miller, 1 N. B. R. 105; 1 Amer. Law T. Rep. Bankr. 121; Fed. Cas. 9,553.

63. A creditor petitioned to have his debtor adjudged bankrupt, and subsequently, the debtor having paid the debt, entered a motion to dismiss; but another creditor having presented a petition alleging the acts of bankruptcy charged were true and praying that the case proceed, *held*, that while permission to withdraw would not prevent other creditors from instituting new proceedings, it would embarrass the operation of the act, and must be denied. In re Mendenhall, 9 N. B. R. 380; 19 Int. Rev. Rec. 86; 6 Chi. Leg. News, 192; Fed. Cas. 9,424.

64. Where a bankrupt gives a release to his assignee in a settlement out of court, and a stipulation is filed discontinuing the proceedings, the bankrupt court has power to set aside the stipulation on proof that it was

obtained from the bankrupt by fraud, or given under a mistake of fact; but such court will not do so until the bankrupt has sought relief in a court having jurisdiction to set aside the release for fraud. In re Bieler, 7 N. B. R. 552; Fed. Cas. 1,394.

65. Reasonable notice must be given to creditors and a hearing of them and an approval by the court of the propriety of such a course before a discontinuance of bankruptcy proceedings can be ordered. In re McKeon, 11 N. B. R. 182; 7 Ben. 513; 3 Amer. Law Rec. 611; 11 Alb. Law J. 7; Fed. Cas. 8,358.

66. Upon a petition for involuntary bankruptcy, the defendant demanded a trial by jury, but no trial was had or adjournment made. Thereafter, a precept was filed for a discontinuance, but no order therefor was entered. Upon motion of a creditor to dismiss proceeding, other creditors appeared and opposed the motion, and it was denied, it being held that the want of adjournment to a day certain did not terminate the proceedings. In re Buchanan, 10 N. B. R. 97; Fed. Cas. 2,073.

67. To prevent a discontinuance of proceedings in bankruptcy by the death of the bankrupt, the warrant is issued *eo instanti* with the entering of adjudication, though not physically issued until afterwards. In re Litchfield, 9 N. B. R. 506; 7 Ben. 259; Fed. Cas. 8,385.

## VII. DIVIDEND.

68. Appeal having been taken from order allowing creditor interest upon unpaid dividend, creditor procured order directing trustee to deposit dividend, interest and costs. *Held*, that such deposit was not a setting aside of money constituting creditor's dividend. In re Kitzinger et al., 19 N. B. R. 307; Fed. Cas. 7,863.

69. Motion to vacate order for dividend may be made upon notice. In re N. Y. Mail S. S. Co., 3 N. B. R. 73; Fed. Cas. 10,212.

70. No second or third meeting of creditors ought to be called or requested by an assignee unless there is money in his hands for dividend. In re Son, 1 N. B. R. 58; 2 Ben. 153; 15 Pittsb. Leg. J. 242; Fed. Cas. 13,174.

## VIII. EVIDENCE.

See EVIDENCE, 3, 17, 94, 106, 109, 132.

(a) *In General.*

71. The order to show cause will be set aside when the depositions are defective, but on supplemental depositions a new order may be issued. *Cunningham v. Cady*, 13 N. B. R. 525; 8 Chi. Leg. News, 165; 4 Amer. Law Rec. 510; Fed. Cas. 3,490.

72. A decree in bankruptcy under the act of 1841 was a matter of record and evidence against all persons that a debt was due to the petitioning creditor; that a bankrupt was a merchant or trader, and that he had committed an act of bankruptcy. *Shawhan v. Wherrett*, 7 How. 627.

73. In suits by an assignee his representative character need not be averred in the pleadings. If a duly certified copy of the assignment be put in evidence, it is not necessary to prove all the steps in the proceedings. *Dambmann v. White et al.*, 12 N. B. R. 438.

74. Under a general averment that the plaintiff was possessed as of his own property, proof may be given that he acquired the title by means of proceedings in bankruptcy. *Id.*

75. Payments made by debtor to petitioning creditors are material facts on denial of bankruptcy, and debtor can introduce evidence of such payment without special traverse of amount of indebtedness. *In re Skelley*, 5 N. B. R. 214; 3 Biss. 260; Fed. Cas. 12,921.

76. Where there is no contradictory evidence on a point, it should be ruled upon as a question of law. *Upton, Ass., v. Tribilcock*, 13 N. B. R. 171; 91 U. S. 45.

77. "The rule that a mistake of law does not avail prevails in equity as well as at common law." *Id.*

78. It is never good pleading to make averment in the alternative, nor is it sufficient in evidence to prove that either one or the other of the two propositions is true, but leaving it uncertain which of them is true. But when two distinct matters, each of which contains a good cause of action or defense, are alleged consecutively, it is enough that either of them is proved. *In re Drummond*, 1 N. B. R. 10; 1 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 4,093.

79. To compel a corporation into involuntary bankruptcy, it must be averred and proved that the corporation is a moneyed, business or commercial corporation; that it is a banker, broker, merchant, trader, manufacturer or miner; that it has fraudulently stopped payment and not resumed payment of its commercial paper for a period of fourteen days. *Alabama & Chattanooga R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126.

80. In a bill of review, the evidence in the original cause cannot be dismissed for the purpose of questioning the propriety of the original decree. It can only be adverted to if at all, for the purpose of showing the relevancy of the new matter to be introduced into the cause. *Buffington v. Harvey, Ass. etc.*, 17 N. B. R. 474; 95 U. S. 99.

(b) *Witness.*

81. Where attorney for creditors asks leave to amend the deposition of a witness as to acts of bankruptcy, *held*, that leave be refused, because such deposition is the proof upon which the rule to show cause why the debtor should not be declared a bankrupt issues, and without which the proceeding is defective. *May v. Harper et al.*, 4 N. B. R. 156; 18 Pittsb. Leg. J. 105; 4 Brewst. 253; Fed. Cas. 9,333.

82. A subpoena to a witness may be served by a party to the proceeding, and when so served he is entitled to the fees and mileage therefor. *Gordon et al. v. Scott et al.*, 3 N. B. R. 28; 6 Phila. 494; 25 Leg. Int. 276; 15 Pittsb. Leg. J. 542; 1 Amer. Law T. Rep. Bankr. 99; Fed. Cas. 5,620.

83. When a commission is issued by the bankrupt court and sent to another state, the circuit court in such state may compel a witness to testify or punish for a refusal. *In re Johnston*, 14 N. B. R. 569; Fed. Cas. 7,423.

## IX. FRAUDULENT CONVEYANCES.

See CONVEYANCES, 33, 47.

84. In a suit by the assignee to recover of a creditor money paid by the bankrupt by way of preference, the declaration must allege that the payment was made within four months before the filing of the petition in bankruptcy, or it will be bad on demurrer.



*Maurer v. Frantz*, 4 N. B. R. 142; *Bean v. Brookmire et al.*, 4 N. B. R. 57; 1 Dill. 25; 4 West. Jur. 872; Fed. Cas. 1,168.

85. Where a preference is alleged, it is not necessary to state that such preference was in fraud of the act, but the name of the person preferred should be set forth. In *re Hadley*, 12 N. B. R. 366; Fed. Cas. 5,394.

86. Where a bankrupt has allowed his property to be taken on legal process with intent to give a preference, the assignee should resort to suit at law or bill in equity to obtain possession, and not proceed by summary petition and order to show cause. In *re Ballou*, 3 N. B. R. 177; 4 Ben. 135; Fed. Cas. 818.

87. Where a creditor entered confession of judgment and levied on stock of bankrupt, and before sale the proceeding in bankruptcy occurred, the courts of the United States have jurisdiction to enjoin such sale, or may require a distinct proceeding in equity against said creditor. *Irving v. Hughes*, 2 N. B. R. (8 vo. ed.) 162; 7 Amer. Law Reg. (N. S.) 209; 6 Phila. 451; 15 Pittsb. Leg. J. 121; Fed. Cas. 7,076.

88. A mortgage executed by a bankrupt after commencement of proceedings may be summarily set aside upon petition of the assignee. In *re Sims*, 16 N. B. R. 251; Fed. Cas. 12,888.

89. A sale not made in the usual course of the bankrupt's business is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain it. In such a case proofs may be taken *ore tenus* at the hearing. *Wilson, Ass. v. Stoddard*, 4 N. B. R. 76; 2 Chi. Leg. News, 161; Fed. Cas. 17,838.

90. A sale was made of a stock in trade when the vendor was insolvent. Vendor was afterwards adjudicated bankrupt. The sale was attacked on the ground that it was made by an insolvent and that the vendee had reasonable cause to believe him insolvent. *Held*, that the bill must allege that the defendant knew the fraud, and such knowledge must be proved. *Crump, Ass. v. Chapman*, 15 N. B. R. 571; 1 Hughes, 183; 1 Va. Law J. 309; 24 Pittsb. Leg. J. 169; Fed. Cas. 3,455.

91. An assignee in bankruptcy may recover damages for an injury to or detention of goods by a party to whom they were

transferred by the bankrupt contrary to the provisions of the bankrupt act, and such recovery may be in an action to obtain possession of the property. *Schumann, Ass. v. Fleckenstein*, 15 N. B. R. 231; 4 Sawy. 174; 9 Chi. Leg. News, 174; Fed. Cas. 12,826.

92. In an action to recover the value of property the complaint must allege a conversion or a demand and refusal. *Id.*

93. A declaration in trover is not sufficient to recover under the bankrupt act. The declaration must set out the facts of the illegal transaction. *Halleck et al. v. Tritch, Ass. etc.*, 17 N. B. R. 298; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

## X. JUDGMENTS, ORDERS AND DECREES.

### (a) *In General.*

94. Neither an order to show cause nor an order of seizure, injunction or arrest will be granted where the petitioner does not make a *prima facie* case. In *re Leonard*, 4 N. B. R. 182; Fed. Cas. 8,255.

95. A special application to the judge of the bankruptcy court for an order for the examination of the bankrupt need not be sustained by a certificate as to the propriety thereof. In *re Brandt*, 2 N. B. R. 109; Fed. Cas. 1,818.

96. After a bankrupt's discharge an order will not be issued directing the assignee to sell real estate to which the bankrupt did not have a legal title at the date of adjudication, and which was not included in his schedule of assets, to satisfy an alleged lien created by a judgment recovered prior to adjudication. In *re Dean*, 3 N. B. R. 188; Fed. Cas. 8,701.

97. On a motion to vacate an order, *held*, that any creditor may move to vacate an order which, through mistake or fraud, has been made to the prejudice of creditors. In *re Hoole*, 19 N. B. R. 477; Fed. Cas. 6,673.

98. No order to show cause can issue against the debtor until proofs sustaining the petition are filed and a *prima facie* case is made. An order to show cause, issued without such proofs, is void, and does not constitute a commencement of proceedings. In *re Rogers*, 10 N. B. R. 444; 1 Cent. Law J. 470; Fed. Cas. 12,003.

99. A. brought suit before a justice of the peace on a note for an amount greater than, but only demanded judgment for an amount less than, the limit of the justice's jurisdiction; and afterwards execution was issued and levied. *Held*, that the amount demanded determined the jurisdiction, and A. could thus obtain priority over bankruptcy proceedings subsequently filed on the same day that execution issued. *Witt, Ass. v. Hereth*, 13 N. B. R. 106; 6 Biss. 474; 8 Chi. Leg. News, 41; 1 N. Y. Wkly. Dig. 436; Fed. Cas. 17,921.

100. Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants. *Smith v. Little*, 9 N. B. R. 111; 5 Biss. 490; 6 Chi. Leg. News, 86; Fed. Cas. 13,072.

101. Where a creditor prosecutes his suit for the purpose of ascertaining the amount due, such fact should appear of record and the judgment should be modified to correspond. *In re Gallison et al.*, 5 N. B. R. 353; 2 Lowell, 72; Fed. Cas. 5,203.

102. On March 1, 1871, the judge of the district of New York signed a decree declaring a certain railroad company a bankrupt, but he kept the decree in his own possession and gave no notice thereof. On March 2d the court of Massachusetts decreed the same company a bankrupt. March 3d the New York decree was declared by the judge. *Held*, Massachusetts the prior one. *In re Boston H. & E. R. Co.*, 6 N. B. R. 222; 9 Blatchf. 409; 6 Amer. Law Rev. 582; Fed. Cas. 1,678.

103. Where suits are pending in the state courts and there is nothing in them which requires the equitable interference of the district court to prevent any wrong to other creditors under the bankruptcy, or any misapplication of the assets, the parties will be permitted to consummate them by proper decrees and judgments, especially where there is no suggestion of fraud on the part of the plaintiffs. *In re Davis*, 8 N. B. R. 167; Fed. Cas. 8,619.

#### (b) *Motion to Set Aside.*

104. Where a decree is sought to be reversed for defects in an adjudication, they should be pointed out, and if they consist of

matters of fact, the evidence should be the subject of distinct reference. *Michaels et al. v. Post, Ass.*, 12 N. B. R. 152; 21 Wall. 398.

105. A bankrupt moved to set aside his default for not appearing on the return day of the order to show cause why he should not be declared a bankrupt, on the ground that the debt of the petitioning creditor was not provable, as it was based upon the sale of intoxicating liquors. *Held*, that the motion came too late and without any excuse being offered for the delay; that the defense, when made by the debtor, founded as it is in violation of law by himself, is not favored. *In re Neilson*, 7 N. B. R. 505; Fed. Cas. 10,090.

106. Motion was made to set aside judgment and *fi. fa.* on grounds that they were not founded on legal verdict or recorded on minutes. At same time motion was made by plaintiff to enter verdict *nunc pro tunc*. To this, defendants objected on grounds that proceedings were pending in bankruptcy. *Held*, that bankruptcy of defendants is no reason why court should not hear a motion to correct its minutes. *Woolfolk et al. v. Gunn*, 10 N. B. R. 526.

#### (c) *Review of.*

107. An allegation in a petition to the circuit court for revision, that petitioner has conformed to the provisions of the act, and is aggrieved because his petition for discharge was refused, is not sufficient. The petition must state in what the error consists, and whether it be of law or fact, and the nature of the alleged error should be distinctly stated for the information of the appellate court and as notice to the opposite party. *Litchfield v. Delaware and H. C. Co.*, 4 N. B. R. 77; 3 Cliff. 371; Fed. Cas. 8,400.

108. Discharge by a final decree was refused an alleged bankrupt on May 12, and his petition for revision was filed in the circuit court on June 30 following. *Held*, that there was no ground, in the absence of a rule limiting the time in which such petitions should be filed, to deprive the petitioner of a rehearing on account of delay. *Id.*

109. A petition for a revision of the decree of the district court refusing a discharge may be entertained, although such decree

was a final one, and no proceedings were pending in the court when the petition for revision was filed. *Id.*

110. A petition for revision of a decree in the United States circuit court must be filed within ten days from entry of decree sought to be revised (act of 1867). *Sweatt v. Boston H. & E. R. R. Co.*, 5 N. B. R. 234; 3 Cliff. 339; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

111. A proceeding to have a debtor adjudged a bankrupt is substantially an action at law, and terminates with the final judgment on the petition therein, and the subsequent proceedings to distribute the estate of the bankrupt are merely consequent upon such action, but form no part of it. Such an action is a case at law, and the proceedings cannot be reviewed in the circuit court until after the final judgment therein; and if the case becomes triable by jury it cannot be reviewed otherwise than upon a writ of error. *In re Oregon B. P. & P. Co.*, 14 N. B. R. 394; 8 Sawy. 529; 8 Chi. Leg. News, 143; Fed. Cas. 10,560.

112. All the appellate jurisdiction of the circuit courts in bankruptcy is conferred upon them by section 4986, Revised Statutes, and sections 4980 to 4984, Revised Statutes, inclusive, regulate its exercise. The terms *cases* and *questions* are used in section 4986 in contradistinction to each other. A case in bankruptcy, at law or in equity, is only reviewable in the circuit court according to the mode prescribed in actions at law or suits in equity. The appellate jurisdiction which the circuit courts may exercise upon petition is confined to the review of the action of the district courts upon questions arising in the proceedings subsequent to an adjudication. *Id.*

113. Certain creditors filed a petition in bankruptcy in the district court against a corporation, which denied that a sufficient number of creditors had signed the petition. The creditors moved to strike out the denial, and the motion was allowed. The corporation filed a petition in the circuit court for a review, and were ordered to show cause why proceedings below should not be stayed pending the proceedings in review. The order to show cause was discharged, it being held that appeal lay only after final judgment in the court below. *Id.*

114. Bankrupt filed in circuit court a petition for a review of decree adjudging him a bankrupt, and at the same time had proceedings pending in state court for an injunction restraining creditors from continuing proceedings in bankruptcy. Creditors moved to have him required to elect whether he would discontinue proceedings in state court or have his petition for review dismissed. *Held*, that he was entitled to prosecute petition for review. *In re Bininger et al.*, 8 N. B. R. 122; 7 Blatchf. 165; 1 Amer. Law T. Rep. Bankr. 186; Fed. Cas. 1,418; *In re Bininger et al.*, 3 N. B. R. 122; 7 Blatchf. 168; 1 Amer. Law T. Rep. Bankr. 187; Fed. Cas. 1,419.

115. An assignee filed a bill asking to have a mortgage on real estate owned by the bankrupt declared void, and it was so declared. Four years later the defendant filed a bill of review. Defendant, assignee, pleaded statute of limitations. Plaintiff filed demurrer. *Held*, that under bankrupt law of 1867 such a proceeding is not a suit. *Wilt v. Stickney, Ass.*, 15 N. B. R. 23; 5 Amer. Law Rec. 630; Fed. Cas. 17,854.

116. Where a bill of review was filed to review an order in bankruptcy proceedings, *held*, that the court could treat such a bill as a petition for review. *Hurst v. Felt, Ass.*, 13 N. B. R. 108; 12 Blatchf. 217; Fed. Cas. 6,939.

117. Mere questions are not re-examinable under the regulations prescribed in the bankrupt acts, nor would any judgment or decree be a regular final judgment or decree unless rendered when the court was in session. *Coit v. Robinson et al.*, 9 N. B. R. 289; 19 Wall. 274.

## XI. PARTNERS.

See PARTNERS, 59, 125, 162.

118. It is a well-established principle that, in cases of partners and joint contractors, an action must be brought against all the partners and all the joint contractors, and the judgment to be rendered must be a joint judgment against all, unless one or more of them shall have died, or have been discharged from the obligation of the contract by operation of law. *Hoyt et al. v. Freel et al.*, 4 N. B. R. 34.

119. A firm having been adjudged bankrupt, individual creditors made application to have the adjudication set aside on the ground that the court had no jurisdiction. *Held*, that they should raise the question in opposition to the firm's discharge when application therefor was made. In re Penn et al., 8 N. B. R. 145; 4 Ben. 99; Fed. Cas. 10,926.

120. Where there are joint creditors, and one is beyond the reach of the process of the court, and equity has jurisdiction, a decree may be taken against the other for the whole amount. *Lewis, Trustee, v. United States*, 14 N. B. R. 64; 92 U. S. 618.

120a. Where one of the partners has died, and under the statute of the state the partnership property is placed in the hands of the personal representative of the deceased partner to be administered, the court in bankruptcy will not, on a petition against the surviving partners, take the estate out of the hands of the administrator. In re Daggett et al., 8 N. B. R. 287; Fed. Cas. 3,535.

## XII. PETITION IN BANKRUPTCY.

See PETITIONS, 12, 59, 70, 87, 92, 105, 127-131, 146.

### (a) *In General.*

121. Stoppage and non-resumption of payment of commercial paper for fourteen days is not an act of bankruptcy unless fraudulent, and this must be distinctly alleged in the petition and affidavits (act of 1867). In re Cone, 2 N. B. R. (8 vo. ed.) 21; 2 Ben. 502; Fed. Cas. 3,095.

122. The allegation that the debtor, "being a merchant and trader, fraudulently stopped payment," is sufficient without alleging that the stoppage was of commercial paper, the amendatory act of 1874 being intended to cover the fraudulent stoppage of the payment of debts generally. In re Hadley, 12 N. B. R. 866; Fed. Cas. 5,894.

123. When a fraudulent stoppage of payment of commercial paper is alleged, the pleader may aver a general stoppage without describing any paper, or he may aver the non-payment of a particular piece of paper, describing it, and relying upon it as *prima facie* evidence of a general stoppage. *Id.*

124. Facts relied upon to justify a war-

rant of arrest and seizure should not be set forth in the creditor's petition. *Id.*

125. Where a petition is verified by an attorney, the non-residence of his principal should be alleged directly and not by way of recital. *Id.*

126. Respondent filed motion to dismiss petition on the grounds that it was not signed and verified as required by rules of the court, but before motion was heard he entered a denial of the act of bankruptcy alleged and demanded a trial of that issue by jury. *Held*, that he waived objections. In re McNaughton, 8 N. B. R. 44; Fed. Cas. 8,912.

127. Where a petition sets forth a fraudulent conveyance as an act of bankruptcy, the intent to defraud should be alleged as a fact and not as a matter of information and belief. In re Orem & Co. v. Harley, 3 N. B. R. 62; 2 Balt. Law Trans. 943; Fed. Cas. 10,567.

128. Objection to an averment on the grounds of insufficiency in setting forth an act of bankruptcy should not be made by demurrer, but by answer. *Id.*

129. B. petitioned the court to adjudicate a bankrupt on A.'s petition which had been abandoned. *Held*, B.'s petition dismissed on ground it should have been filed on return or adjourned day. In re Olmstead, 4 N. B. R. 71; Fed. Cas. 10,505.

130. In an action of *assumpsit* the affidavit of defense set out the filing of the petition, and claimed that the same was a bar to the suit. *Held*, that the filing of the petition by a debtor is not a bar to the prosecution of an action in a state court. *Murphy v. Young*, 18 N. B. R. 505.

131. If neither the petition nor the deposition as to the act of bankruptcy be signed by the petitioner, the defect is fatal. *Hunt et al. v. Pooke et al.*, 5 N. B. R. 161; Fed. Cas. 6,896.

132. In a petition in bankruptcy the allegation was made that the defendant, "being insolvent or in contemplation of bankruptcy," made a conveyance with intent to give a preference. *Held*, that this charge of an act of bankruptcy in the alternative was not sufficient. In re Hanibel et al., 15 N. B. R. 233; 9 Chi. Leg. News, 165; 15 Alb. Law J. 271; 24 Pittsb. Leg. J. 152; Fed. Cas. 6,023.

133. A petition of review was brought

from the decision of the court below sustaining a demurrer to a petition in bankruptcy that stated upon "belief," but did not allege "knowledge or information," as to the number of creditors signing the petition. The order below was reversed. In re Mann, 14 N. B. R. 572; 18 Blatchf. 401; Fed. Cas. 9,033.

134. Where a petition is based on the failure of an alleged bankrupt as a manufacturer to pay its notes, but does not state that the notes were passed in its business, the petition is defective. In re The Capital P. Co., 18 N. B. R. 819.

135. An application was made by judgment creditor for order to assignee to sell real estate and apply proceeds to payment of petitioner's judgment, claiming that, as judgment was recovered before bankruptcy proceedings, it was therefore a lien on real estate. Assignee contended judgment was invalid. Held, section 88 of the act of 1867, concerning commencement of proceedings, is construed to mean the filing of a petition, sustained by proofs of bankruptcy and claim of creditor, and no order to show cause can issue against the debtor until such proofs sustaining petition are filed. Order to show cause issued without such proofs is void, and does not constitute commencement of proceedings in bankruptcy. In re Rogers, 10 N. B. R. 444; 1 Cent. Law J. 470; Fed. Cas. 12,008.

136. Any creditor, other than the one petitioning that the debtor be adjudged a bankrupt, can intervene at any time before adjudication and be heard, upon application made to the court, in behalf of such debtor. In re Mendenhall, 9 N. B. R. 380; 19 Int. Rev. Rec. 86; 6 Chi. Leg. News, 192; Fed. Cas. 9,424.

137. A petitioner in involuntary bankruptcy set forth that he was a creditor of the respondent. The latter by his answer and proofs convinced the court that the former was not a creditor. Held, petition dismissed. In re Cornwell, 6 N. B. R. 305; 6 Amer. Law Rev. 365; Fed. Cas. 1,250.

138. Proceedings in bankruptcy were instituted by creditors, but were dismissed before adjudication. Afterward without further notice the proceedings were reinstated against one debtor. Held, that such rein-

statement is without authority, and an adjudication following it is void. Gage et al. v. Gates, 15 N. B. R. 145.

### (b) Amendment.

#### See AMENDMENTS.

139. A petition of bankruptcy alleged that the debtor, in contemplation of bankruptcy, confessed judgment in favor of J., and that execution was issued thereon, which was intended to give a preference to J. Petitioners were permitted to amend the petition *nunc pro tunc* by inserting, "while insolvent, or in contemplation of bankruptcy," in lieu of "in contemplation of bankruptcy." Held, that such amendment was permissible. In re Craft, 2 N. B. R. 44; 6 Blatchf. 177; Fed. Cas. 3,317.

140. An amendment of the petition which affects the whole foundation of the proceedings *nunc pro tunc* is in direct violation of the act of 1867; but where the amendment is the formal assertion of an averment which appeared in substance in the petition, the debtor cannot be taken by surprise thereby, and the amendment is permissible. Id.

141. A petitioner in bankruptcy may have leave of court to convert his petition into bill in equity, but the answers filed and testimony taken cannot be used in suit in amended form except by consent. Barstow v. Peckham, 5 N. B. R. 72; Fed. Cas. 1,064.

142. Where an amended petition is faulty, objection may be taken to it even though no objection was made to the same fault which the original petition contained. In re The Western Savings Trust Co., 17 N. B. R. 413; 4 Sawy. 190; Fed. Cas. 17,442.

143. Several of the creditors signing the petition, as appeared from the schedule, had claims amounting to less than \$250, and it did not appear from the petition that the officer signing for a bank had authority to act. Held, that the court had jurisdiction to allow amendment. In re Roche et al. v. Fox, 16 N. B. R. 461; Fed. Cas. 11,974.

144. It was sought by petition to have a firm adjudicated bankrupt; but one of the members of the firm was not made a party. An application to amend, made after the taking of proofs, was denied. In re Pitt et

al., 14 N. B. R. 59; 8 Ben. 389; 23 Pittsb. Leg. J. 196; Fed. Cas. 11,188.

145. Where petition averred that acts were committed by bankrupt in contemplation of bankruptcy, and evidence of insolvency only was given, the petition should be amended. In re Beardsley, 1 N. B. R. 121; 1 Amer. Law T. Rep. Bankr. 94; Fed. Cas. 1,184.

146. The omission to file proof of an act of bankruptcy is a substantial defect which cannot be remedied. In re Brown, 15 N. B. R. 416; 9 Chi. Leg. News, 191; Fed. Cas. 1,981.

### .(c) *Nature of Proceeding.*

147. A proceeding to have a debtor adjudged bankrupt is a civil and not a criminal proceeding. In re De Forrest, 9 N. B. R. 278; Fed. Cas. 3,745.

148. A proceeding in bankruptcy is not a suit *inter partes*, but partakes of the nature of a proceeding *in rem* in which every creditor has a direct interest. In re Boston H. & E. R. R. Co., 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 582; Fed. Cas. 1,678.

149. A proceeding in involuntary bankruptcy against a corporation is a proceeding *in rem*. Platt v. Archer, 6 N. B. R. 405; 9 Blatchf. 559; Fed. Cas. 11,213.

## XIII. REFEREE OR TRUSTEE.

See TRUSTEE, 4, 23, 110-112, 123, 174.

### (a) *In General.*

150. The assignee is entitled to be made a party to suits pending in the state court by or against the bankrupt, and the bankrupt will be enjoined from interfering. Samson v. Burton, 4 N. B. R. 1; 5 Ben. 343; Fed. Cas. 12,285.

151. The jurisdiction of suits by or against assignees in bankruptcy is part of the law and equity jurisdiction of the United States courts, and is subject to the revision of the United States supreme court by appeal, and does not exclude the concurrent jurisdiction of the state courts. Goodrich v. Wilson, 14 N. B. R. 555.

152. An assignee is not required to make an amendment to his return on motion of the bankrupt's solicitor, where it is not shown to be necessary, or that the interest of the bankrupt will be promoted by making it,

or injured by not making it. In re Kingon, 8 N. B. R. 113; 38 How. Pr. 392; Fed. Cas. 7,815.

153. Where, under an agreement of the execution creditor, the property levied on passes into the possession of the assignee without prejudice to such prior lien, under the levy, the assignee and the register should, if the execution creditor asks it, expedite the decision. In re Hafer et al., 1 N. B. R. 163; 6 Phila. 474; 25 Leg. Int. 164; Fed. Cas. 5,897.

154. A sale was made by the sheriff of a portion of the bankrupt's personal property subsequent to his filing his petition, and the proceeds thereof held to await court's decision as to whether the same should be paid to the assignee or the creditors. Additional time was asked by the assignee within which to make his report as to articles set off to the bankrupt. The extension was granted. In re Shields, 1 N. B. R. 170; 15 Pittsb. Leg. J. (O. S.) 391; Fed. Cas. 12,785.

155. A cross-bill which sets up a discharge in bankruptcy and does not name the assignee as a party is not thereby defective, four years having elapsed since his appointment and his final settlement having been made. Phelps et al. v. Curtis et al., 16 N. B. R. 85.

156. Where a creditor has leave to proceed with a pending cause pursuant to section 5106, Revised Statutes, a judgment without making the assignee a party is valid. In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153; Fed. Cas. 1,704.

157. A statement in a complaint that the plaintiff is assignee in bankruptcy may be treated as surplusage, or as *descriptio personæ*. Dambmann v. White et al., 12 N. B. R. 438.

158. The accounting by the voluntary assignee should be to the assignee in bankruptcy, and there should be no subsequent account under the state law unless a distribution is required under the state law. In re Burkholder et al., 4 N. B. R. 191; 28 Leg. Int. 125; 8 Phila. 172; Fed. Cas. 2,165.

159. A motion to compel an assignee in bankruptcy to do his duty is properly made before the register. In re Blaisdell et al., 6 N. B. R. 78; 5 Ben. 420; 42 How. Pr. 274; Fed. Cas. 1,488.

160. G., a creditor, upon a refusal of assignee to proceed, brought an action in his own name against the assignee bankrupt

and others to reach property fraudulently conveyed by the bankrupt. *Held*, that the proper remedy was by petition to the court to compel the assignee to act. *Glenny v. Langdon et al.*, 19 N. B. R. 24; 98 U. S. 20.

161. In an action of trover by an assignee in bankruptcy, he undertook to set out in his declaration the manner in which he claimed to own the property, but failed to allege adjudication, and it was held bad in substance. *Wright, Ass. v. Johnston*, 4 N. B. R. (8 vo. ed.) 626; 8 Blatchf. 150; Fed. Cas. 18,082.

162. Where the register, to whom the matter had been referred to ascertain the extent of the assets, did not make his report until after the passage of the amendment of July 14, 1870, to the bankrupt act, the order of reference was amended so as to comply therewith. *In re Rockwell et al.*, 4 N. B. R. 74; Fed. Cas. 11,987.

163. The bankrupts surrendered their property to the register, who appointed watchmen to guard it, and reported his action to the court, who ordered report to be referred to United States commissioner to take testimony. *In re Bogart*, 2 N. B. R. 178; 1 Chi. Leg. News, 842; Fed. Cas. 1,599.

#### (b) Costs.

164. An application for an order for the payment of expenses incurred for services of counsel by the assignee for petitioning creditor, in proceedings prior to the adjudication, cannot be entertained by the register, but there must be a petition to the court by the party, setting forth the facts and asking the relief desired. *In re Dibblee et al.*, 3 N. B. R. 185; 4 Ben. 137; Fed. Cas. 3,886. See *New York Mail Steamship Co.*, 3 N. B. R. 185; Fed. Cas. 10,208.

165. The proper way to bring the matter of attorneys' fees before the court when contested was by petition, and reference would be ordered for testimony. *In re Rosenberg*, 3 N. B. R. 18; Fed. Cas. 12,056.

166. The United States marshal and assignee are officers of the court and must obey the orders of the register, and necessary expenses and disbursements in the protection of the bankrupt's estate must be taxed by the register. *In re Carow*, 4 N. B. R. 178; 41 How. Pr. 112; Fed. Cas. 2,426.

#### (c) *Petitions or Suits of.*

167. Where assignee of bankrupt filed a petition alleging that the bankrupt, within six months of bankruptcy, conveyed certain real estate and two promissory notes with intent to defeat the provisions of the bankrupt act, praying for an injunction and to set aside conveyance,—on objection made by grantee that the proper remedy is by bill in equity, *held*, that objection be overruled and assignee be allowed to proceed with his petition. *In re Norris*, 4 N. B. R. 10; 1 Amer. Law T. Rep. Bankr. 227; 3 Amer. Law T. 216; Fed. Cas. 10,304.

168. V. was adjudicated bankrupt and an assignee was appointed. Certain creditors secured goods of V. by writ of replevin after the petition was filed. Assignee petitioned district court for the goods, and an order issued directing goods be delivered to assignee. From this order creditors prayed for review by district court. Petition dismissed. *In re Vogel*, 3 N. B. R. 49; 7 Blatchf. 18; 1 Amer. Law T. Rep. Bankr. 170; 2 Amer. Law T. 154; Fed. Cas. 16,982.

169. An assignee filed his petition setting forth the fraudulent transfer of bankrupt's property, and praying that the purchasers thereof should be required to show cause why they should not deliver said property over to him and to pay to him the proceeds of any part thereof sold by them. *Held*, that the petition and the proceedings, which should be of a summary character, were a proper mode of procedure. *Bill, Ass. v. Beckwith et al.*, 2 N. B. R. 82; 1 Chi. Leg. News, 103; Fed. Cas. 1,406.

170. An order of seizure was given against goods in name of purchaser from a bankrupt; upon giving joint and several bond, with sureties, goods were returned to purchaser. In proceedings to set aside sale decree was made declaring sale fraudulent, and purchaser prosecuted two unsuccessful appeals, executing bonds for the same. Execution issued against purchaser and a part of the decree was realized. On petition by assignee against sureties on original bond for balance due under decree, *held*, that assignee could elect which of several bonds to proceed upon, and might proceed upon original bond, and it being joint and several he might proceed against one or more. *Storrs*

et al. v. Eagle et al., 19 N. B. R. 90; 3 Hughes, 414; Fed. Cas. 13,494.

171. Proceedings to compel bankrupts to pay funds, collected either before or after bankruptcy, belonging to the estate, may be instituted by summary petition. In re Ettinger, 18 N. B. R. 222; Fed. Cas. 4,543.

172. S. was served with a rule to show cause why he should not deliver to assignee two horses bought from B. S. subsequently became surety for B. on an appeal bond in justice court, for which B. gave him \$200 for indemnification. *Held*, proceedings by assignee were premature and rule discharged. In re Buse, 3 N. B. R. 52; Fed. Cas. 2,221.

173. Where an assignee commenced suit against lien-holders, the bankruptcy court ordered the sale by assignee and referee jointly of mortgaged property and deposit of proceeds in treasury of court to await determination of suit. In re Columbian M. Works, 3 N. B. R. 18; Fed. Cas. 3,039.

174. An assignee who desires to test the validity of a mortgage executed by bankrupt and restrain foreclosure proceedings on the same should proceed by bill in equity. In re New York Kerosene Oil Co., 3 N. B. R. 31; Fed. Cas. 10,206.

175. As assignee petitioned the court to require that certain books, claimed both by him and by an assignee of the bankrupt's own choosing, be delivered to him. *Held*, he could proceed either at law or in equity. Rogers v. Winsor, 6 N. B. R. 246; Fed. Cas. 12,028.

176. Actions by assignee to recover assets claimed to belong to the bankrupt should be commenced by bill in equity or suit at law. In re Bonesteel, 3 N. B. R. 127; 7 Blatchf. 175; Fed. Cas. 1,627.

177. A creditor obtained a judgment, the debtor being insolvent, and the sheriff levied on the goods. The assignee in bankruptcy sued the judgment creditor in the bankrupt court. The defendant claimed that the assignee should have applied to the state court for an order on the sheriff. *Held not*. Traders' Nat. Bank, 6 N. B. R. 353; 14 Wall. 87.

178. An assignee in bankruptcy can proceed against an adverse claimant of property only by action at law or bill in equity; but whether an adverse claimant may not proceed against an assignee by petition, *quære?*

Ferguson v. Peckham, 6 N. B. R. 569; 29 Leg. Int. 285; 6 Alb. Law J. 291; Fed. Cas. 4,741.

178a. The mortgagees of certain realty assets of a bankrupt corporation brought suit in a state court to foreclose and to make the assignee in bankruptcy a defendant. The assignee filed a petition in the United States district court praying that proceedings in the foreclosure suit be stayed and that the mortgage be set aside as invalid. *Held*, that the proceedings by the assignee should have been by bill in equity and not by petition. In re New York Kerosene Oil Co., 3 N. B. R. 31; Fed. Cas. 10,206.

#### (d) *Removal of Trustee.*

179. If a creditor after proving his claim wishes to have assignee in bankruptcy removed he can petition the court. In re Carson, 5 N. B. R. 290; 5 Ben. 277; Fed. Cas. 2,460.

180. On revisory petition to circuit court for the removal of an assignee in bankruptcy, the practice is to direct the district court to remove the assignee and appoint some proper person. In re Perkins, 8 N. B. R. 56; 5 Biss. 254; Fed. Cas. 10,982.

181. The register was directed to employ counsel for the estate of the bankrupt at the hearing of an order to show cause why the assignee should not be removed. In re Price, 4 N. B. R. 137; Fed. Cas. 11,409.

182. In order to warrant proceedings against an assignee for not complying with General Order No. 28 under the act of 1867, it must be shown by *prima facie* evidence that he has received funds or made deposits in respect to which he ought to have made a report to the court under said order. In re Goodwin, 3 N. B. R. 106; Fed. Cas. 5,550.

#### XIV. SECURITIES.

183. Every creditor, secured or unsecured, of a bankrupt, is a defendant in the proceedings, and if a creditor has a lien, and wishes to protect it, he must disclose its particular character, that it may legally and according to its priority be ascertained and liquidated. In re Bridgman, 1 N. B. R. 59; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 1,866.

184. Where stock is pledged to secure call loans the pledgee need not obtain leave of court to sell stock pledged and pay sur-



plus into court. In re Grinnell, 9 N. B. R. 187; Fed. Cas. 5,829.

185. Where value of a security is agreed upon between the assignee in bankruptcy and a creditor, and new facts are afterwards developed to show valuation was incorrect, the court will order a new valuation. In re Newland, 9 N. B. R. 62; 7 Ben. 63; 2 Ins. Law J. 860, 895; Fed. Cas. 10,171.

186. A creditor fully secured may file a petition in bankruptcy without expressly waiving his preference therein, but the better practice is to do so. In re Stansell, 6 N. B. R. 183; Fed. Cas. 13,293.

187. Petition was filed by creditor of bankrupt, claiming property by virtue of unrecorded mortgages and bills of sale of earlier date than of recorded mortgage. Petition dismissed for want of jurisdiction. Barstow v. Peckham, Ass., et al., 5 N. B. R. 72; Fed. Cas. 1,064.

188. Order for sale under mortgage should designate place of deposit of money as separate fund by register. The register will be directed to make the deed free from lien, and the lien will be transferred to the proceeds of property. In re Hann, 5 N. B. R. 292; 4 N. B. R. 189; 4 Ben. 469; Fed. Cas. 6,026.

189. In order to entitle a mortgagee to apply to the court for leave to foreclose a mortgage in another court, he must prove his debt in bankruptcy court as secured. The petition must show claim proved, date and amount, and state mortgaged property and its actual value. The petition must be duly signed and verified — before notary is sufficient. In re Sabin, 9 N. B. R. 383; Fed. Cas. 12,193.

## XV. UNITED STATES AND STATE COURTS.

### (a) *In General.*

190. In all questions relating to real estate federal courts will follow the laws and decisions of the courts of the state in which the land is situated. In re Zug et al., 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 84 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

191. Bankruptcy court will not take cognizance of a petition filed by one creditor when he has an adequate remedy by pro-

ceeding in equity. In re Avery v. Johann, 3 N. B. R. 36; 2 Amer. Law T. Rep. Bankr. 92; 4 N. B. R. 143; 1 Chi. Leg. News, 261; Fed. Cas. 675.

192. A district court may not proceed summarily against persons claiming titles adverse to that of the assignee. The proceeding must be by suit at law or in equity. In re Marter, 12 N. B. R. 185; Fed. Cas. 9,143.

193. Although the court in bankruptcy has the discretion at any stage of proceedings to permit amendments to be made to pleadings, it is a discretion limited to the same cause of action, and it should not permit, under forms of "amendments," new causes of action to be introduced. In re Leonard, 4 N. B. R. 182; Fed. Cas. 8,255.

194. Where it is for the interest of the creditors that the estate be administered in the bankruptcy court, the fact that it is more expensive than proceedings in a state court will not control. In re Duryea, 17 N. B. R. 495; Fed. Cas. 4,196.

195. The act of congress of 1790 does not relate to proceedings in the federal courts, nor does it forbid any state to admit in its courts proof of the records in the courts of the other states different from that prescribed by the act. Miller v. Chandler, 17 N. B. R. 251.

196. Federal courts may decline to entertain actions brought by assignees for less than \$500 in amount. Wente v. Young et al., 17 N. B. R. 90.

197. A proceeding in bankruptcy, from the time of its commencement until the final settlement of the estate, is but one suit. Sandusky v. The First Nat. Bank, 12 N. B. R. 176; 23 Wall. 289.

198. A bankruptcy proceeding, by which the estate of a debtor is administered, is an equitable one. Coit v. Robinson et al., 9 N. B. R. 289; 19 Wall. 274.

199. The United States circuit court cannot take notice of objection on technical grounds where no demurrer has been filed in the district court. Babbitt v. Burgess, 7 N. B. R. 561; 2 Dill 169; 5 Chi. Leg. News, 326; Fed. Cas. 693.

200. The defendant in an equity suit must account before a master for property received by him. Orders of reference to a

master will be settled on notice. *Benjamin v. Graham*, 4 N. B. R. 130; Fed. Cas. 1,301.

201. A writ of sequestration to take property from the possession of the assignee cannot be issued after the commencement of proceedings, even though a suit is pending in a state court when the proceedings in bankruptcy are instituted. *Hewett, Ex'r, v. Norton, Ass.*, 13 N. B. R. 276; 1 Woods, 68; 1 N. Y. Wkly. Dig. 535; Fed. Cas. 6,441.

202. Bankrupts were named as universal legatees in the will of one H. The heirs of H. brought suit, in a state court, against the bankrupts, prior to the institution of proceedings in bankruptcy, asking that the will be set aside and an accounting be had. *Held*, that the action should be allowed to proceed. *Id.*

203. A state court first obtaining possession of property and control of litigation has the right to finish proceedings before interference by the bankrupt court, and any rights of the assignee will be protected. *Appleton v. Bowles et al.*, 9 N. B. R. 354.

204. The effect of bankruptcy upon suits pending in state courts is to suspend them, but they may, with leave of the bankrupt court, be prosecuted to judgment to ascertain the amount due, but final process to secure satisfaction cannot be issued. *Allen & Co. v. Montgomery et al.*, 10 N. B. R. 503.

204a. Where a voluntary assignment had been executed less than three months before the commencement of bankruptcy proceedings, and a creditor brought suit in a state court to compel the voluntary assignee to account and had a receiver appointed, and an assignee in bankruptcy was thereafter appointed, whereupon a reference was ordered by the bankrupt court to determine what should be awarded the creditor as expenses, *held*, that such creditor may not apply to the state court for an order directing the payment, out of the estate in the hands of the voluntary assignee, of the referee's fees included in such action. *In re Dumahaut et al.*, 17 N. B. R. 517; Fed. Cas. 4,125.

### (b) *Appeals and Writs of Error.*

#### See APPEALS AND WRITS OF ERROR.

205. If a defendant be adjudged a bankrupt after he has taken an appeal, an affirmation of the judgment in the absence of a

suggestion of his bankruptcy is not a nullity. *Flanagan v. Pearson*, 14 N. B. R. 37.

206. One lien creditor may take an appeal without other lien creditors being parties to the appeal. *Milner, Jr., v. Meeks, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

207. A writ of error brings up the whole record, and the plaintiff in error may take advantage of a fatal defect in the declaration. *In re Marionneaux*, 13 N. B. R. 222; 1 Woods, 37; Fed. Cas. 9,088.

208. One tribunal in reviewing the judgment of another, or the findings of its own subordinate officers, should not reverse for error where the facts upon which the inferior tribunal has proceeded are not brought before it. *In re The Weber Furn. Co.*, 13 N. B. R. 559; Fed. Cas. 17,331.

209. An appeal was pending in a state court from an order denying a motion to vacate an attachment against the bankrupt, and upon his adjudication as such he procured an order requiring the plaintiffs in the attachment to show cause why all proceedings should not be stayed to await the determination of the bankruptcy proceedings; pending this order the appeal was called in its order on the calendar. The defendants being present and not desiring to proceed, the appeal was dismissed for want of prosecution. *Held*, not a violation of the order staying proceedings. *In re Hirsch*, 2 N. B. R. 1; 2 Ben. 493; 1 Amer. Law T. Rep. Bankr. 92; Fed. Cas. 6,529.

210. Appeals given by the eighth section of the bankrupt act of 1867 to the circuit court, in suits in equity, are not from orders or interlocutory decrees, but from final decrees of the district court. *In re Casey*, 8 N. B. R. 71; 10 Blatchf. 376; Fed. Cas. 2,495.

211. Where a debtor is adjudged a bankrupt under the act of 1867, pending an appeal from the judgment of the court of ordinary on the homestead exemption, the bankruptcy court will not take possession of the property allotted for exemption; but the assignee will apply for leave to be made a party to the appeal, and there contest the judgment of the inferior court. *In re Moseley et al.*, 8 N. B. R. 208; Fed. Cas. 9,868.

212. Parties went to trial, and the jury, under instructions from the court, found the respondents guilty. To the findings respondents excepted and sued out a writ of error

and removed the cause into the circuit court, which dismissed the writ for want of jurisdiction. On appeal to the supreme court, *Held*, that the circuit court erred in dismissing the writ (1867). *Knickerbocker Ins. Co. v. Comstock*, 8 N. B. R. 145; 16 Wall. 258.

213. When the creditor takes an appeal from a decision in favor of an assignee, and the case comes into the circuit court, it is to be there reconstructed; and the creditor is required to file a declaration, and the issues are then made up and the case tried in the same way as a case at law commenced in the circuit court (1867). *Stillwell v. Walker, Ass. etc.*, 17 N. B. R. 569; 6 Cent. Law J. 406; Fed. Cas. 13,451.

214. An appeal having been taken from the district court to the circuit court, it was held to be a case for review. On a petition for review, the order appealed from having been affirmed, it was held that an appeal does not lie to the supreme court (1867). *Dimick v. Coleman*, 17 N. B. R. 479; 95 U. S. 266.

215. In a suit brought by an assignee in a state court without direction from the bankruptcy court, defendant pleaded to the declaration. *Held*, that the point could not be raised in an appellate court (1867). *Hal-leck et al. v. Tritch, Ass. etc.*, 17 N. B. R. 298; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

216. After the recovery of judgment and an appeal by the defendant, he was declared a bankrupt upon his own application. The plaintiff, with notice thereof, obtained judgment on appeal, whereupon a further appeal was taken. The plaintiff moved to dismiss the appeal on the ground that it should be prosecuted by the assignee in bankruptcy. The motion was denied (1867). *Sanford v. Sanford*, 12 N. B. R. 565.

217. The district court having decided that a creditor could not file objections to the discharge of the bankrupt until he had proven his debt, an appeal was taken to the circuit court upon a motion to dismiss. *Held*, that appeal is not the proper method to take a question arising during the progress of a case in bankruptcy into the circuit court (1867). *In re Reed*, 2 N. B. R. 2; Fed. Cas. 11,638.

218. A mere refusal by the circuit court to entertain a bill to review district court

proceedings gives no right of appeal to the United States supreme court, the presumption being that such refusal was based upon want of merit; but where such refusal is for want of jurisdiction, an appeal will lie to enable the complainants to have a hearing before the circuit court, if the supreme court decides them to be thereto entitled (1867). *First Nat. Bank v. Cooper et al.*, 9 N. B. R. 529; 20 Wall. 171.

219. The order by which the debtor was adjudged a bankrupt may be reviewed by the circuit court, although brought up by bill of exception instead of a writ of error; and the case falls clearly within its supervisory jurisdiction where all the testimony was reduced to writing and preserved in the exceptions (1867). *In re Picton*, 11 N. B. R. 420; 2 Dill 548; Fed. Cas. 11,186.

220. An order of the district court discharging a bankrupt cannot be reviewed in the circuit court on writ of error, where the record present only questions of fact (1867). *Ruddick v. Billings*, 8 N. B. R. 14; Woolw. 330; 2 West. Jur. 275; Fed. Cas. 12,110.

221. Where no bond has been filed in a case of appeal, no appeal can be allowed after the expiration of ten days from the entry of the decree, as the United States district court cannot enlarge the right of appeal (1867). *Benjamin v. Hart*, 4 N. B. R. 138; 4 Ben. 454; Fed. Cas. 1,302.

222. Where an appeal bond is proper in form and the sureties are sufficient, the United States district court will approve it as a bond which would be a proper one if given in time, leaving it to the appellee to move the appellate court to dismiss the appeal. *Id.*

223. Where the district court cannot approve an appeal bond as proper in form, and the delay in filing has been more than ten days, the issuing of execution on the decree will not be stayed. *Id.*

224. Creditors whose claims were rejected appealed to the circuit court from an order awarding the assignee costs to be paid by appellants. Appeal bond was not filed nor notice given within ten days after the order. *Held*, that appeals should be dismissed (1867). *In re Kyler*, 8 N. B. R. 11; 6 Blatchf. 514; Fed. Cas. 7,957.

225. A claim was rejected by the district

court. Within ten days after the decree to that effect the creditor claimed an appeal from such decision, and gave notice thereof, as required by the bankruptcy act of 1867, but he did not file in the circuit court the statement required by the act and rule 26 of the general orders in bankruptcy, nor enter the appeal during the ten days limited by rule 26. *Held*, that the appeal be dismissed. *In re Place et al.*, 4 N. B. R. 178; 8 Blatchf. 302; 3 Chi. Leg. News, 218; Fed. Cas. 11,300.

226. In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded. *In re York et al.*, 4 N. B. R. 156; 10 Amer. Law Reg. (N. S.) 86; Fed. Cas. 18,189.

226a. An appeal does not lie to the supreme court of the United States from the decree of a circuit court dismissing an appeal from a district court, for the reason that the case was one for review and not appeal, and affirming under a petition for review the order appealed from. *Minick v. Coleman*, 17 N. B. R. 479; 95 U. S. 266.

### (c) *Demurrer.*

227. A party having once appeared cannot withdraw appearance on the ground that the court has no jurisdiction, but must raise such question by demurrer. *In re Ulrich et al.*, 3 N. B. R. 84; 3 Ben. 355; Fed. Cas. 14,327.

228. A demurrer to an answer was properly overruled where the answer amounted to a denial of the validity of bankruptcy proceedings, and the defendant cannot be denied the right to establish that bankruptcy proceedings are void. *Stuart, Ass., v. Au-mueller et al.*, 8 N. B. R. 541.

229. A pleading in the alternative will be held bad on demurrer when relating to a material fact. *In re Redmond et al.*, 9 N. B. R. 408; Fed. Cas. 11,682.

230. A defendant who files a demurrer to the petition will not be allowed, after such demurrer is overruled, to file a general answer of denial of the acts of bankruptcy alleged in the petition and demand a trial by jury. *In re Benham*, 8 N. B. R. 94.

231. Where the remedy at law is plain and complete, without any reasonable doubt, equity will decline jurisdiction, provided the

objection is taken by demurrer or is claimed in the answer. *Garrison, Ass., v. Mackley*, 7 N. B. R. 246; Fed. Cas. 5,256.

232. Replications filed in an action in a state court, setting up fraudulent acts of the bankrupts in avoidance of the discharges, are bad on demurrer. *Reed v. Bullington*, 11 N. B. R. 408.

233. After the bankrupt had been discharged creditors brought an action to have the discharge declared void on the ground that the debtor had concealed property, setting out the manner in which it had been concealed, and asking that certain conveyances be set aside. Defendant demurred. *Held*, that no such defect of substance of the case as would sustain a demurrer. *Nicholas, Ass., v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

234. At most a demurrer on the ground that a bill does not state facts sufficient to constitute a cause of suit is no more than a general demurrer for want of equity. Such demurrer is unknown to chancery practice. *Id.*

235. Where the petition for review is demurred to, the demurrer admits the truth of its statements. If the demurrer is overruled the averments of the petition stand good, and if these are sufficient the decree below is reversed. *Curran v. Munger*, 6 N. B. R. 83; Fed. Cas. 3,487.

236. A demurrer will be sustained to a bill to set aside a conveyance in fraud of creditors, to the joinder of the purchaser, without averring that he had knowledge of the fraud. *Pratt v. Curtis*, 6 N. B. R. 139; 3 Lowell, 87; Fed. Cas. 11,375.

237. A demurrer to a bill in equity brought by the assignee on the ground that the complainant has a complete remedy at law will be overruled where the facts show that questions of fraud, trust and partnership are all involved in the case. *Taylor, Ass., v. Rasch et al.*, 5 N. B. R. 399; 4 Amer. Law T. Rep. 201; Fed. Cas. 13,801.

238. The petition in bankruptcy averred that a firm were manufacturers and made and delivered certain notes, etc., which were negotiated but not paid. On demurrer, *held* not necessary to aver that notes were given for purposes of their manufacturing business. *In re Kenyon & Fenton*, 6 N. B. R. 238.

239. If a demurrer to an intervening pe-

tition is overruled, the demurrant is entitled to answer and be heard on the merits. *Jordan, Ass. v. Downey*, 12 N. B. R. 427.

(d) *Injunction.*

See INJUNCTION, 28, 65, 75, VI.

240. The service of an injunction on a person does not make him a party in interest of a bankruptcy proceeding, though he might by petition or motion have a wrongful injunction dissolved. *Karr v. Whittaker et al.*, 5 N. B. R. 123; Fed. Cas. 7,613.

241. Where grounds of injunction are alleged in the petition on information and belief, and the petition was not accompanied by affidavits sustaining the allegations, *held*, that allegations upon information and belief, unsupported by other proof, are not sufficient. *In re Bloss*, 4 N. B. R. 37; Fed. Cas. 1,562.

242. Where a restraining order is asked for at the commencement of proceedings against any person other than the debtor, no judgment of contempt can be had against such party for disregard of such order, unless it was granted on a separate petition. *Creditors v. Cozzens et al.*, 3 N. B. R. 73; 2 West. Jur. 349; 16 Pittsb. Leg. J. 236; Fed. Cas. 3,378.

243. A., having been adjudicated a bankrupt, petitioned the circuit court for a review, and obtained injunctions from the state court restraining the creditors from continuing the proceedings in bankruptcy. On petition by creditors to the circuit court for a writ prohibiting the state court from further entertaining actions by A. for the purpose of interfering with the adjudication, *held*, that such writ not being necessary for the exercise of the circuit court's injunction, the petition should be denied. *In re Bininger et al.*, 3 N. B. R. 121; 7 Blatchf. 159; 1 Amer. Law T. Rep. Bankr. 183; 17 Pittsb. Leg. J. 177; Fed. Cas. 1,417.

244. An action was commenced before a justice of the peace and judgment recovered. Defendant appealed to the circuit court and judgment was again rendered against him. In the rendition of the verdict the defendant suggested his bankruptcy and obtained leave to file a transcript of the proceedings. *Held*, that the proceedings should have been

pleaded to entitle the bankrupt to a stay pending discharge. *Holden v. Sherwood*, 18 N. B. R. 111.

245. Before a justice of the peace the pendency of bankruptcy proceedings may be brought to the attention of the court by motion based on a transcript of the proceedings. *Id.*

246. Proceedings in bankruptcy were begun against a debtor in two different district courts; *held*, proper proceeding to *stay*, not *dismiss*, second. *In re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

247. The granting of a rehearing and the granting or dissolving of a temporary injunction are always in the sound discretion of the court, and therefore furnish no ground of appeal. *Buffington v. Harvey, Ass. etc.*, 17 N. B. R. 474; 95 U. S. 99.

248. Where an injunction has been granted by the court, a motion to dissolve it is the proper procedure, and not a petition to dissolve. *In re Mallory*, 6 N. B. R. 23; 1 Sawy. 88; Fed. Cas. 8,991.

249. Petitioning creditor objected to the hearing of a motion to dissolve an injunction restraining certain parties from disposing of goods received from the bankrupt, on the ground that the order to show cause had not been returned, and the prohibition by the bankrupt act of "further proceedings" until such return. *Held*, that the prohibition of "further proceedings" does not apply to collateral proceedings. *In re Muller et al.*, 3 N. B. R. 86; Deady, 518; 2 Amer. Law T. Rep. Bankr. 33; Fed. Cas. 9,912.

250. A motion to dissolve an injunction in state courts was held unnecessary, as order of discharge terminated the injunction. *In re Thomas*, 3 N. B. R. 7; Fed. Cas. 13,890.

(e) *Jury.*

See JURY TRIALS, 7.

251. Instructions are entitled to a reasonable construction, and, if correct when applied to the facts submitted to the jury, they will be sustained even though, when standing alone, they would be incomplete in respect of some matter sufficiently explained in evidence. *Willis v. Carpenter*, 14 N. B. R. 521; Fed. Cas. 17,770.

252. A respondent who does not file his answer until after the expiration of the rule to show cause cannot demand that the issues raised be tried by jury. *In re Gebhardt*, 3 N. B. R. 63; Fed. Cas. 5,294.

253. On the return day of order to show cause the defendant appeared by attorney, but neither filed answer nor demanded trial by jury, and a continuance was granted on request of defendant. On day to which case was continued he entered his motion for leave to file answer and demanded trial by jury. *Held*, that he had waived right to jury trial. *In re Sherry*, 8 N. B. R. 142.

254. If a bankruptcy case be tried by the court without a jury, as it may be with the assent of the defendant, implied from his failure to demand one, it is still a case at law, but may be reviewed on petition. *In re Oregon B. P. & P. Co.*, 14 N. B. R. 394; 3 Sawy. 539; 8 Chi. Leg. News, 143; Fed. Cas. 10,560.

255. It is not a ground for nonsuit that the plaintiff has been adjudged a bankrupt since the suit was begun, as the court may direct the jury, if they find for the plaintiff, to find that he may recover for the use of his assignee. *Wooddail, Adm'r, v. Austin et al.*, 10 N. B. R. 545.

255a. In an action by an assignee of a bankrupt corporation to recover a portion of the proceeds of the sale of certain lumber furnished to the corporation, but the title to which was in dispute, *held*, that it was proper to submit to the jury the question whether anything remained to be done to the lumber by the seller, as the question of title depended upon this. *Gates, Ass., v. Winooski*, 18 N. B. R. 31; Fed. Cas. 5,270.

### (f) Parties.

256. Where an appellant in the supreme court of the United States becomes bankrupt after his appeal taken, his assignee in bankruptcy, upon production of the deed of assignment of the register duly certified, may, on motion, be substituted as appellant. *Hernndon v. Howard*, 4 N. B. R. 61; 9 Wall. 604.

257. A bankrupt before bankruptcy, or his assignee thereafter, is a necessary party to a suit in equity on an order on funds obtained before bankruptcy, and the bank-

ruptcy court has exclusive jurisdiction of all questions pertaining to the estate. *Walker, Ass., v. Seigel et al.*, 12 N. B. R. 394; 2 Cent. Law J. 508; Fed. Cas. 17,085.

258. An assignee will not be made a party to an action brought for the recovery of property alleged to have been wrongfully converted by the bankrupt, and which was seized by the sheriff, unless it is shown that the bankrupt has some right in the property in dispute. *In re Gunther et al. v. Greenfield, and Raeder v. Same*, 3 N. B. R. 179.

259. Six months prior to bankruptcy proceedings bankrupt made a voluntary assignment. Plaintiff was afterwards, and before filing of petition, appointed receiver in proceedings supplementary to execution. In a suit against bankrupt, assignee in bankruptcy and voluntary assignee to set aside assignment as void, *held*, that property covered thereby was "property transferable to and vested in assignee;" and that all persons having an interest therein affected by decree were properly joined as defendants. *Onley, etc. v. Tanner et al.*, 19 N. B. R. 173; Fed. Cas. 10,506.

260. In a suit on certain notes defendant alleged that the notes were secured by mortgages which had been foreclosed by plaintiff and that the assignee in bankruptcy of one of the makers of the notes was not made a party and the proceeding was therefore void. *Held*, that the proceeding was valid as to all persons parties. *Brown v. Gibbons*, 13 N. B. R. 407.

261. In a suit by the assignee to set aside a conveyance made by the bankrupt to defendant in fraud of creditors the bankrupt was not made a party. *Held*, that he need not have been. *Buffington v. Harvey, Ass. etc.*, 17 N. B. R. 474; 95 U. S. 99.

262. The wife and children of a bankrupt are not necessary parties defendant to an action by his assignee against him and the insurer to enjoin collection of insurance policies transferred in contemplation of insolvency. *Vetterlein v. Barnes*, 124 U. S. 169.

263. Assignee of bankrupt defendant was appointed during pendency of action. *Held*, that other defendants could not make assignee defendant, but, if they had claim for contribution against bankrupt, their remedy was by intervention in bankruptcy proceed-

ings. *Oliver v. Cunningham et al.*, 19 N. B. R. 400; Fed. Cas. 10,493.

**264.** Several persons united to effect fraudulent disposition of bankrupt's property. *Held*, that they could all be joined as defendants in action by assignee, though relief sought against them respectively relates to different parts of estate. *Van Kleeck, Ass., v. Miller et al.*, 19 N. B. R. 484; Fed. Cas. 16,860.

**265.** Where the allegation in support of jurisdiction of the court is that the parties all live in the district, and is found to be contrary to the facts, the court has no jurisdiction of the case. *In re Beals et al.*, 17 N. B. R. 108; 9 Ben. 223; Fed. Cas. 1,165.

**266.** When a petitioning creditor abandons the proceedings, any other creditor may intervene, and the court may proceed to an adjudication. Such right of intervention cannot be defeated by any arrangement between the bankrupt and any creditor, and any action of the court defeating such right is in violation of the statute. *In re Lacey et al.*, 10 N. B. R. 477; 12 Blatchf. 322; Fed. Cas. 7,965.

**267.** When there appears to be an adverse interest in any one not before the court, it cannot adjudicate on the same without that person being before it for the purpose of litigating any supposed rights. *In re Pierce et al.*, 15 N. B. R. 449; 7 Biss. 426; 9 Chi. Leg. News, 800; 15 Alb. Law J. 517; Fed. Cas. 11,139.

**268.** Every person submitting himself to the jurisdiction of the bankrupt court for the purpose of having his rights determined is a party to the suit, and is bound by the determination of the court. *Wiswall et al. v. Campbell et al., Ass.*, 15 N. B. R. 421; 93 U. S. 347.

**269.** Unless made parties defendant, the agents and officers of a corporation cannot be made to answer the interrogatories in a bill. *French, Ass., v. The First Nat. Bank.*, 11 N. B. R. 189; 7 Ben. 488; Fed. Cas. 5,099.

**270.** A complaint must always show title in plaintiffs of the subject-matter of action, or such an interest as indicates them to be proper parties; otherwise it fails to state facts sufficient to constitute a cause of action. *Mosselman et al., Tr., v. Caen*, 10 N. B. R. 512.

**271.** The question of a misjoinder of par-

ties can be raised only by those improperly joined. *Spaulding, Ass., v. McGovern et al.*, 10 N. B. R. 188; Fed. Cas. 13,217.

**272.** An assignee in bankruptcy sued a creditor who had obtained judgment and had levied on the goods of the debtor. A subsequent judgment creditor who had levied on the same goods was out of the jurisdiction and could not be served with process, and was not made a party. *Held*, he was not a necessary party. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

**273.** Where property is in a receiver's hands, no party having interest therein will be permitted, without the court's leave, to enforce their rights by an original suit. if the relief sought is competent in the pending litigation. *Sutherland et al. v. Lake Sup. S. C., R. & I. Co.*, 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

**274.** To a bill by a junior mortgagee against a mortgagor or his assignee in bankruptcy, prior incumbrancers are necessary parties where there is substantial doubt as to the amounts which are due them or the property covered by their liens. *Id.*

**275.** Where a bill is filed charging fraud, and the gravamen is found to be transfers of property in transactions in violation of the bankrupt act to persons not parties in the bill, it was held that the bill could not be treated as brought to set aside the conveyances, as it does not pray for such relief; as all parties connected with them are not parties defendant; and as even if they were all parties it would be multifarious; and the bill would be dismissed. *Harmanson, Ass., v. Bain et al.*, 15 N. B. R. 173; 1 Hughes, 188; Fed. Cas. 6,072.

**276.** Certain creditors having adopted a resolution under the bankrupt act appointing trustees, parties interested contested the confirmation of the resolution. *Held*, that the parties desiring the confirmation were the moving parties and should serve their papers on the contestants. *In re American Waterproof Cloth Co.*, 3 N. B. R. 74; 1 Ben. 526; Fed. Cas. 818.

**277.** The question as to which party in a suit has the right to open and close must be determined by the record, the defendant possessing such right when by the pleadings the burden is upon him, and the plaintiff would

be entitled to a verdict without any evidence. *In re Jelsh et al.*, 9 N. B. R. 412; Fed. Cas. 7,257.

278. Where the questions certified to a United States district judge are abstract, and do not arise in the course of the bankruptcy proceedings, and are certified in behalf of a person who is not a party in the bankrupt court, such questions, not being certified as authorized by the bankrupt act, will be returned undecided, for the reason that a decision on them would be of no effect. *In re Haskell*, 4 N. B. R. 181; Fed. Cas. 6,191.

279. The denials of bankruptcy are questions solely between petitioning creditors and debtors, with which no outside party, claiming to be a creditor, can interfere. *In re Boston, H. & E. R. R. Co.*, 5 N. B. R. 232; Fed. Cas. 1,679.

280. A fund in a depository's hands is claimed by several parties, among them the assignee in bankruptcy. The latter obtained a rule to show cause, on another claimant, why the depository should not pay the fund over to him. *Held*, possession of depository is the possession of claimant if claim be just, and proceedings to recover must be by suit in law or equity. *Smith v. Mason*, 6 N. B. R. 1; 14 Wall. 419.

281. Strangers to the proceedings in bankruptcy, and who have not voluntarily become parties to such litigation, cannot be compelled to come into court under a petition for a rule to show cause. Such parties must be proceeded against by a suit at law or in equity. *Id.*

282. A creditor attacking the jurisdiction of the bankrupt court need not first file formal proof of his debt, for this would impart a recognition of the jurisdiction. He must, however, show that he is a creditor and that he had an interest to protect. *In re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

### (g) *Plea and Answer.*

283. A defendant after answer raised the question of the jurisdiction of the court. *Held*, objection not too late. *Jobbins v. Montague*, 6 N. B. R. 509; Fed. Cas. 7,330.

284. As pleas in abatement tend to delay the trial of the action, great precision is re-

quired in framing them. Therefore, if the plea or answer relies upon a transfer of the interest of the plaintiffs to abate the action, it must state to whom the transfer has been made. *Sutherland v. Davis*, 10 N. B. R. 424.

285. Where in a bill the complainant describes himself as an assignee, an objection to such bill that he is not legally such assignee must be made by plea, not by demurrer. *Nicholas, Ass. v. Murray et al.*, 18 N. B. R. 469; 5 Sawy. 320; Fed. Cas. 10,223.

286. A plea to the jurisdiction may be interposed in the first instance in the appellate court, when the objection is of a nature which could not have been obviated if interposed in the court of original jurisdiction. *Cook v. Waters et al.*, 9 N. B. R. 155.

287. Where a bill was brought to recover from the defendant money alleged to be due to the plaintiff on an agreement by the defendant with the bankrupts to pay them, as salaries, certain portions of the net profits realized from the business carried on by defendant, and for an accounting, the court decided that a plea of the statute of limitations was not warranted. *Sedgwick v. Casey*, 4 N. B. R. 161; 4 Ben. 562; 3 Chi. Leg. News. 177; Fed. Cas. 12,610.

288. To a plea of bankruptcy of plaintiff as a bar to his further prosecution of a suit commenced prior to filing of petition, where the trustees in bankruptcy had fulfilled their duties and been discharged, nothing having been done by them in the original suit, *held*, plea overruled, the right of continuing such suit reverting to the bankrupt. *Conner v. The Southern Ex. Co.*, 9 N. B. R. 138.

289. An answer to a petition of creditors, denying the commission of an alleged act of bankruptcy, and averring that they should not be declared bankrupts for any cause alleged, amounts to the general issue and no replication is necessary. *In re Dunham*, 2 N. B. R. 9; 2 Ben. 488; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 4,143.

290. In the district court, as a court of bankruptcy, pleading must be special. Hence a general denial of the intent with which an act relied upon as an act of bankruptcy is alleged to have been done is not a good defense, but the respondent must also allege and prove with what intent he did such act. *In re Silverman*, 4 N. B. R. 173; 2 Abb. (U. S.)



243; 1 Sawy. 410; 13 Int. Rev. Rec. 52; Fed. Cas. 12,855.

291. In an answer a general denial amounts to no more than denial of a conclusion of law. *Lathrop v. Drake et al.*, 13 N. B. R. 472; 91 U. S. 516.

292. Debtors filed their answer to creditor's petition, denying the commission of the acts of bankruptcy, and averring they should not be adjudicated bankrupts for any cause alleged. *Held*, that such answer amounted to the general issue and no replication is necessary. *Dunham v. Welch*, 2 N. B. R. 9; 2 Ben. 488; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 4,143.

293. If any allegation is to be taken as true because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering. *White v. Jones*, 6 N. B. R. 175; 29 Leg. Int. 325; Fed. Cas. 17,550.

294. If the assignee and creditors failed in the period of six weeks to answer the petition of bankrupt's wife, and to adduce testimony in refutation of the petition and of the testimony of the bankrupt and other witnesses, the court has a right to presume that no testimony was available, and that no denial by answer could be made. *In re Campbell*, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

295. The interlocutory petition and rule nisi are the principal instruments of pleading in the summary proceeding, and correspond with the bill and answer in the plenary one. As to general creditors, even the petition and rule are unnecessary. *Id.*

296. Where parties to bankruptcy proceeding appear on the return day and join issue, and no further proceedings or adjournment is had, the case is to be considered as pending until disposed of. *In re Buchanan*, 10 N. B. R. 97; Fed. Cas. 2,073.

297. If a cause be heard on petition and answer, the statements in the answer will be deemed to be true. *Jordan, Ass., v. Downey*, 12 N. B. R. 427.

298. On petition in involuntary bankruptcy, answer was filed by the debtor, but not verified, and on objection, *held*, that verification must be attached. *In re Findlay*, 9 N. B. R. 83; 5 Biss. 480; 6 Chi. Leg. News, 94; Fed. Cas. 4,789.

299. Only such answers as may be called for by the note at the foot of a bill is a defendant bound to answer. *French, Ass., v. The First Nat. Bank*, 11 N. B. R. 189; 7 Ben. 488; Fed. Cas. 5,099.

300. A defendant's answer denying upon information and belief admits the allegations of the bill to be true, it being required that his knowledge, if any, in such answer, be positive and personal. *Burfee v. First Nat. Bank*, 9 N. B. R. 314.

301. Where several allegations of bankruptcy are set forth in the petition, if respondent does not file his answer of denial in the nature of a special plea to each allegation, he may deny each charge in a general manner. *In re Hawkeye S. Co.*, 8 N. B. R. 885.

302. An answer is sufficient which contains a general denial, and states that the respondent has not committed the acts of bankruptcy set forth, and avers that he should not be declared bankrupt for any cause in the petition alleged. *Id.*

303. A respondent may set forth as many defenses to the petition as he has, but each defense must be pleaded separately. *In re Quimette*, 3 N. B. R. 140; 1 Sawy. 47; Fed. Cas. 10,622.

304. On motion for adjudication on creditors' petition for insufficiency of answer, *held*, that the answer was not sufficiently defective to justify the granting of the motion, and respondent was directed to file a new answer instantan. *In re Heydette*, 8 N. B. R. 332; Fed. Cas. 6,444.

305. If the respondent desires to controvert the petition, he should, on the return day, appear before the court and allege that the facts in the petition are not true, and demand a hearing or a trial by jury, and the court should make a record of such allegation and demand; but no portion of these proceedings is required to be in writing except the demand for a trial by jury. *Id.*

306. Where the facts charged in the bill are positively denied in the answer, and are supported by only one witness, the rule is well settled as administered in the federal courts that the court will not decree in favor of the complainant. *Scammon, Ass., v. Cole et al.*, 5 N. B. R. 257; 3 Cliff. 472; Fed. Cas. 12,432.

307. Where the defendant in an action

to recover personal property and before trial has been required to deliver personal property to another who is entitled to its possession, the fact may be set up in the answer for the purpose of barring recovery of possession in value of said property. *Bolander v. Gentry*, 2 N. B. R. (8 vo. ed.) 656.

308. In order that the opposite party may be heard, and the court determine whether there has been inexcusable laches or whether reasons appear for refusing the motion, the defendant should apply for leave to file a supplemental answer. *Holyoke et al. v. Adams et al.*, 18 N. B. R. 418.

309. Unless the papers show a case in which the court may exercise a discretion as to granting it, leave to file a supplemental answer must be granted. *Id.*

310. Where an assignee brings an action to recover goods seized by the creditors on the ground that the seizure was made to secure a preference, and the defendant files an answer containing a general denial and a special affirmative defense, the general denial puts in issue all the material allegations of the petition, and the assignee can only recover upon the petition; he cannot rely upon the special affirmative matter in the answer. *Cragin v. Carmichael*, 11 N. B. R. 511; 2 Dill 519; Fed. Cas. 8,819.

311. Trustees of a bankrupt estate began suit against a sole defendant for money paid by the bankrupt in fraud of the bankrupt act. The bill of particulars did not disclose the joint liability of the defendant with others. Defendant pleaded the general issue. *Held*, it was too late for the defendant to take advantage of the non-joinder; he should have done so by plea in abatement. *Van Dyke et al. v. Tinker*, 11 N. B. R. 808; Fed. Cas. 16,849.

312. To a petition against a debtor alleging that he had committed acts of bankruptcy by suspending payment of his commercial paper, the defendant answered, denying his insolvency and alleging a defense, *i. e.*, that the notes were usurious; and on demurrer to answer, *held*, demurrer overruled on the ground that the answer prevented an issue of fact upon the suspension of payment; and further, that it was not the intention of the act to force a debtor to pay every piece

of paper to which he has put his name, under penalty of being adjudged a bankrupt, regardless of any defense he might have. *In re Staplin*, 9 N. B. R. 142; 5 Chi. Leg. News, 528; 5 Leg. Op. 171; Fed. Cas. 13,304.

313. A petition in involuntary bankruptcy being filed, the debtor filed a paper in the words of "Form No. 1" (act of 1867), and a special answer to the petition, verified by his oath. The petitioners thereupon moved for judgment, and the bankrupt asked for trial by jury. Upon the pleadings the petitioners were held to be entitled to judgment. *In re Sutherland*, 1 N. B. R. 140; *Deady*, 344; Fed. Cas. 13,638.

314. A bankrupt had purchased articles of luxury and given them to his wife while he was insolvent. The wife attempted to hold them against the assignee, claiming that there must be a bill in chancery or suit at law to determine her rights. *Held*, that the bankrupt must answer the petition, and that if it appeared that the wife had an adverse interest, she would be entitled to have the right determined in an independent proceeding. *In re Pierce et al.*, 15 N. B. R. 449; 7 Biss. 426; 9 Chi. Leg. News, 300; 15 Alb. Law J. 517; Fed. Cas. 11,139.

315. New facts alleged by the defendant in his answer are considered as denied by the plaintiff in the state (Louisiana) courts without any replication, and the same rules of practice have been adopted in the circuit courts. Matters in avoidance, therefore, alleged in the answer are open to every objection of law and fact the same as if specially pleaded. *Levy v. Stewart & Co.*, 4 N. B. R. 198; 11 Wall. 244.

#### (h) *Process and Service.*

316. A subpoena for a witness may be served in another district if he does not live more than one hundred miles from the place where the register who issues the subpoena requires the witness to attend. *In re Woodward*, 12 N. B. R. 297; 8 Ben. 112; 1 N. Y. Wkly. Dig. 83; 7 Chi. Leg. News, 387; Fed. Cas. 18,000.

317. The marshal has no authority to serve a subpoena to appear in a suit brought as ancillary to proceedings in bankruptcy,

where such service is out of the district for which he is appointed. *Jobbins v. Montague*, 6 N. B. R. 117; 5 Ben. 425; Fed. Cas. 7,329.

318. If the defendants do not reside within the district, the court has no power to obtain jurisdiction over their persons by any service of process otherwise than in accordance with rule 18. *Hyslop v. Hoppock*, 6 N. B. R. 557; 5 Ben. 583; Fed. Cas. 6,989.

319. The assignee filed a bill to set aside conveyances, but the defendants could not be found upon whom to serve subpoenas. Upon application to have service made by publication or personal service on the son of the defendant, *held*, application refused. *Id.*

320. A bill having been filed to set aside a conveyance of a bankrupt, the subpoena was served by leaving it at a house which had formerly been, but was not then, the residence of the defendants. *Held*, not sufficient. *Hyslop v. Hoppock*, 6 N. B. R. 552; Fed. Cas. 6,988.

321. A subpoena was made returnable on the first Tuesday of the month, and not on the first Monday, which was return day, according to the general equity rules. *Held*, a sufficient compliance with order 32 in bankruptcy (act of 1867). *Id.*

322. Under section 40 of the act of 1867 service in involuntary bankruptcy may be made by serving copy of petition and order to show cause personally or leaving the same at the last place of abode, or it may be made by publication in such manner as the court may direct. *Alabama & C. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126.

323. A person making service against a bankrupt went to his usual dwelling-house, and inquired of the woman who answered and appeared to be the mistress of the house, for the bankrupt, and she declining to give information further than that he was not in, a copy of the petition and order was left for bankrupt. *Held*, a sufficient service. *In re Derby*, 8 N. B. R. 106; 6 Ben. 232; 6 Alb. Law J. 422; Fed. Cas. 3,815.

324. The word "person" includes corporations, and service is to be made personally upon a corporation by delivering a copy of the petition and order to show cause to its principal officers, and the "usual place of abode" should be construed to mean the principal office of the corporation. *In re Cal.*

*Pac. R. R. Co.*, 11 N. B. R. 193; 3 Sawy. 240; 2 Cent. Law J. 79; Fed. Cas. 2,815.

325. Personal service on one member of a firm out of the jurisdiction of the court in which the proceedings are pending is not a sufficient service to give the court jurisdiction to adjudicate against the party so served. *Isett v. Stuart*, 16 N. B. R. 191.

326. If a marshal have two or more processes in his hands at the same time and in the same matter, which may be served at the same time and place, mileage can only be charged once; but if the service of any one of such processes makes additional travel necessary, he may charge for such additional travel. *In re Donahue et al.*, 8 N. B. R. 453; Fed. Cas. 3,979.

327. Attached property was sold and the proceeds paid to the plaintiff's attorney. Before the sale a petition in bankruptcy was filed in another state, and after the sale an adjudication was entered. Order to show cause why attachment should not be dissolved and sheriff ordered to deliver the property to the assignee. *Held*, that the order to show cause not having been served on the sheriff the proceeding was of no effect against him. *Dickerson v. Spaulding et al.*, Ass., 15 N. B. R. 318.

328. An order to show cause may be served outside the district in which the petition is filed, by any one authorized by the petitioner to make service. Publication can be had only where the party cannot be found or his place of residence ascertained. *Stuart v. Hines*, 6 N. B. R. 416.

329. Service of the rule to show cause on the cashier of a corporation (bank) which has passed into the hands of a receiver is sufficient to enable the bankrupt court to proceed to adjudication. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,218.

330. Service of a copy of the order of adjudication is a right personal to the bankrupt, and delay in such service should not retard the course of proceedings. *In re Kennedy et al.*, 7 N. B. R. 337; Fed. Cas. 7,699.

331. When the marshal undertakes the service of the warrant, the service of the order of adjudication in bankruptcy is a necessary incident to that duty, although it is not embraced within the writ. In making his return he may make it wholly on the

warrant or separately on the warrant and order, but the latter course is preferable. *Id.*

332. In case of non-service of creditors of bankrupt, the first meeting must be adjourned and a new notice to creditors must be sent out. When no adjournment is had in such case, the proceedings have fallen through, and a new warrant must issue. *In re Schepeler*, 3 N. B. R. 42; 3 Ben. 346; Fed. Cas. 12,452.

### PLEDGE.

See SALE, 102.

1. Where there is a valid pledge of goods, money paid to redeem them cannot be recovered. *Jenkins v. Mayer*, 3 N. B. R. 189; 2 Biss. 303; Fed. Cas. 7,272.

2. The goods thus pledged being of greater value than the debt should be redeemed for the benefit of creditors. *Id.*

3. Where stock is pledged to secure call loans, leave of the court need not be obtained by the pledgee, on the pledgor's bankruptcy, to sell the pledged stock and pay the surplus into court. *In re Grinnell*, 9 N. B. R. 137; Fed. Cas. 5,829.

4. It is not a fraud upon creditors for a debtor to receive collaterals from his pledgee for collection, as a pledgee does not lose his property in collaterals pledged to him by putting them in the hands of the pledgor for collection. *Clark, Ass., v. Iselin*, 11 N. B. R. 337; 21 Wall. 300.

5. A pledgee's right to dispose of the property pledged is suspended from the filing of the petition in bankruptcy of the pledgor until the appointment of an assignee, in the same manner as if the pledgor had died intestate; the pledge must wait for representatives to be appointed. *In re Grinnell & Co.*, 9 N. B. R. 29; 7 Ben. 42; 21 Pittsb. Leg. J. 82; Fed. Cas. 5,830.

6. The rights of the pledgee are not impaired or affected by any of the provisions of the bankrupt law of 1867. *Yeatman v. New Orleans Savings Institution*, 17 N. B. R. 187; 95 U. S. 764.

7. A refusal by the pledgee to surrender the property to the assignee unless he redeems is not equivalent to a conversion, even though pledgee does not prove his claim. *Id.*

### POLICY OF INSURANCE.

See INSURANCE.

### POOR DEBTOR.

See COSTS AND FEES, 50.

### POSSESSION.

See ESTATE.

### POSTPONEMENT.

See MEETINGS, 2, 5, 7; PROOF OF CLAIMS, VIII.

1. Where the officers of a bankrupt corporation present large claims, the register in bankruptcy should postpone the proof of such claims until after the election of the assignee. *In re Lake Superior Ship Canal, Railroad & Iron Co.*, 7 N. B. R. 376; Fed. Cas. 7,997.

2. The postponement of a proof of claim by a register in bankruptcy affects no right of the creditor except the right to vote for assignee. *Id.*

### POWER OF ATTORNEY.

I. TO REPRESENT CREDITORS.

II. TO CONFESS JUDGMENT.

III. WHEN IRREVOCABLE.

IV. EXECUTION OF JOINT.

V. ACKNOWLEDGMENT OF.

See DISCHARGE, 48.

#### I. TO REPRESENT CREDITORS.

1. A power of attorney executed by one member of a firm on behalf of the firm, authorizing a person to cast the vote of the firm for assignee at the first meeting of creditors, is valid. *In re Barrett*, 2 N. B. R. 165; 2 Hughes, 444; 1 Chi. Leg. News, 202; 2 Amer. Law T. Rep. 182; 11 Int. Rev. Rec. 21; 1 Amer. Law T. Rep. Bankr. 144; Fed. Cas. 1,043.

2. The assent of the non-subscribing partners need not be shown. *Id.*

3. An attorney cannot act for a creditor at meetings in the bankruptcy proceedings unless authorized by letter of attorney properly acknowledged. *In re Christley*, 10 N.

B. R. 268; 6 Biss. 154; Fed. Cas. 2,702. *Contra*, In re Powell, 2 N. B. R. 17; Fed. Cas. 11,354.

4. Powers of attorney to represent creditors may be acknowledged before a notary public. General Order No. 34, under the act of 1867, providing that such letters may be acknowledged or proved before a register or United States commissioner, was not intended to be exclusive of other methods of proof. In re Butterfield & Burr, 14 N. B. R. 195; Fed. Cas. 2,248.

## II. TO CONFESS JUDGMENT.

See PREFERENCES, IX, (d).

5. Given under pressure, a warrant of attorney to confess a judgment, under which goods are taken on execution, is not procuring, but is suffering the goods to be taken on execution. In re Craft, 1 N. B. R. 88; 2 Ben. 214; Fed. Cas. 3,316.

6. In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character, etc., of the alleged bankrupt's business may be taken into consideration. In re Leeds, 1 N. B. R. 138; 25 Leg. Int. 140; 1 Amer. Law T. Rep. Bankr. 78; 7 Amer. Law Reg. (N. S.) 693; 6 Phila. 468; 15 Pittsb. Leg. J. 361; Fed. Cas. 8,205.

7. A warrant of attorney to confess judgment given by debtors who know themselves to be insolvent, and suffer their property to be levied on by virtue of an execution issued thereon, with intent to give preference thereby to creditors, is an act of bankruptcy. In re Dibble, 2 N. B. R. 185; 3 Ben. 283; 1 Chi. Leg. News, 355; Fed. Cas. 3,884.

8. The fact that a judgment was entered on a warrant of attorney does not invalidate the judgment when the creditor did not know of the insolvency and it was entered up in contemplation thereof. In re Weeks, 4 N. B. R. 116; 2 Biss. 259; Fed. Cas. 17,350.

9. The entry of a judgment upon warrant of attorney within four months of the filing of a petition in bankruptcy, the creditors having reasonable cause to believe debtor insolvent, constitutes fraud, even though at the time of the execution of the bond there was no reason to believe debtor insolvent. In re Lord, 5 N. B. R. 318; Fed. Cas. 8,503.

10. The preference by means of a judg-

ment note is obtained not with the note when a warrant of attorney to confess judgment is executed and delivered, but when it is executed by the entry of the judgment. Hood et al. v. Karper et al., 5 N. B. R. 358; 8 Phila. 160; 28 Leg. Int. 340; Fed. Cas. 6,664.

## III. WHEN IRREVOCABLE.

11. The power to execute a deed in a mortgagor's name and as his attorney is not affected by his bankruptcy, although the sale under the power contained in the mortgage took place after the commencement of the proceedings in bankruptcy. Hall v. Bliss et al., 14 N. B. R. 329. But see Lockett v. Hoge, 9 N. B. R. 167; Fed. Cas. 8,444.

12. A., being indebted to a bank in which he owned stock, executed an irrevocable power of attorney to the cashier to transfer such to the bank or any other person, with power to appoint a substitute. A. afterwards became bankrupt and the cashier died. A.'s assignee claimed the security on the ground that the power was revoked. *Held*, that it was not revoked. Lightner, Ass., v. First Nat. Bank of Strasburg et al., 15 N. B. R. 69.

## IV. EXECUTION OF JOINT.

13. The powers given by a letter of attorney to several persons jointly cannot be exercised by one of the attorneys alone. In re Phelps et al., 1 N. B. R. 189; 2 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,071.

## V. ACKNOWLEDGMENT OF.

14. A notary public has the authority to take acknowledgment of letters of attorney. In re McDuffie, 14 N. B. R. 836; 2 Hask. 76; 9 Chi. Leg. News, 40; Fed. Cas. 8,778.

## PRACTICE.

See PLEADING AND PRACTICE.

## PREFERENCES.

### I. IN GENERAL.

### II. COMPLETED WITHIN PROHIBITED PERIOD.

### III. EFFECT OF.

## IV. ESSENTIALS TO ESTABLISH PREFERENCE.

- (a) *In General.*
- (b) *Reasonable Cause to Infer Insolvency.*

## V. FRAUD INVOLVED DEFINED.

## VI. INTENT.

## VII. NOT FORBIDDEN.

## VIII. OBTAINED BY BANK.

## IX. OBTAINED UNDER LEGAL PROCESS.

- (a) *Judgment — In General.*
- (b) *Confession of Judgment.*
- (c) *Suffering Judgment.*
- (d) *Warrant of Attorney.*

## X. OBTAINED THROUGH PAYMENT.

## XI. OBTAINED UNDER PRESSURE.

## XII. OBTAINED THROUGH SALE.

## XIII. OBTAINED THROUGH SECURITY.

- (a) *In General.*
- (b) *Mortgage.*

## XIV. OBTAINED THROUGH TRANSFER OF MERCHANDISE.

## XV. SURRENDER OF.

- (a) *In General.*
- (b) *What is Not.*
- (c) *When Cannot be Made.*

## XVI. NOT PREFERENCES.

- (a) *In General.*
- (b) *Because of Present Consideration.*
- (c) *Bill of Sale.*
- (d) *Change of Security.*
- (e) *Judgment.*
- (f) *Mortgage.*
- (g) *No Reasonable Cause.*
- (h) *Payment.*
- (i) *Advances.*

See ACTS OF BANKRUPTCY, 51, 78; ATTACHMENT, 6, 43-45; CLAIMS, 99, VII; COMMERCIAL PAPER, III; CONVEYANCES, 1; DISCHARGE, 36, 103, 122, 126, 165, 168; ESTATES, 88, 182, 193, 257-266; EVIDENCE, 80, 95; JUDGMENTS, V; LIEN, 52; MORTGAGE, 15, 22, 91, 102, 119, 136; PARTNERS, 106, 108; PLEADING AND PRACTICE, 84-90, 167; PROOF OF CLAIMS, 67, 69; RENT, 32; STATUTORY CONSTRUCTION, 20, 24-26; TIME, 7.

## I. IN GENERAL.

1. Where a merchant or trader has shown his inability to meet his engagements, one

creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. *Beattie v. Gardner et al.*, 4 N. B. R. 106; 4 Ben. 479; Fed. Cas. 1,191.

2. For the purpose of sustaining an action to set aside a transfer of property by a bankrupt as fraudulent against creditors, an assignee in bankruptcy is deemed to represent the creditors, and may impeach the transfer notwithstanding it may be held valid and binding against the bankrupt himself. *Allen v. Massey*, 4 N. B. R. 75; 2 Abb. (U. S.) 60; 1 Dill. 40; 2 Chi. Leg. News, 309; Fed. Cas. 231.

3. A conveyance made of property in trust which gives certain creditors an illegal preference over others, and delays the collection of just debts of the maker of the deed, will be set aside, in which event both the right to a homestead and dower will revive. *In re Detert*, 11 N. B. R. 293; 7 Chi. Leg. News, 180; 14 Amer. Law Reg. (N. S.) 166; Fed. Cas. 3,829.

4. A debtor unable to meet his liabilities was advised by one of his creditors, to whom about one-half of his debts were owing, to make an absolute transfer of all of his property to him at a valuation which nearly or quite absorbed the same, which was done. Held to constitute a fraudulent preference and to be void. *Foster, Ass., v. Hackley*, 3 N. B. R. 131; 2 Amer. Law T. Rep. Bankr. 8; 1 Chi. Leg. News, 137; Fed. Cas. 4,971.

5. An insolvent debtor conveyed the larger part of his property to one creditor, hoping thereby to get additional credit. Held fraudulent. *Toof v. Martin*, 6 N. B. R. 49; 13 Wall. 40.

6. Any transfer of property of an insolvent debtor, made with a view to secure it or any part of it to one, and thus prevent equal distribution, is a transfer in fraud of the act (1867). *Id.*

7. The district court adjudged the claims of a creditor affected by preferential securities, and debarred him from participating in the fund then being distributed. On appeal to the circuit court, held, that the judgment of the district court was conclusive (act of 1867). *In re Leland*, 16 N. B. R. 505; 5 Blatchf. 240; Fed. Cas. 8,235.

8. The class of preferences set forth in section 35 of the act of 1867 includes such as are absolutely void, and the right is given to

the assignee to recover the property for the use of the general creditors. In *re Pieron*, 10 N. B. R. 107; Fed. Cas. 11,153.

9. The thirty-fifth and thirty-ninth sections of the bankrupt act of 1867 make void all transactions by which one creditor, with knowledge of the debtor's insolvency and with assent of the debtor, obtains a preference over the other creditors. *Golson et al. v. Neihoff et al.*, 5 N. B. R. 56; 2 Biss. 434; Fed. Cas. 5,524.

9a. An agreement between creditors who have received preferences to contribute proportionately such sum as may be necessary to induce other creditors to forbear to put the debtor into bankruptcy is valid. *Perryman v. Allen*, 15 N. B. R. 113.

## II. COMPLETED WITHIN PROHIBITED PERIOD.

10. The day on which the petition was filed is excluded in computing the time a preference must stand in order to be valid. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 331; 94 U. S. 553.

11. Where the parties, at the time of executing a preferential deed, agree to conceal it from other creditors, and for that purpose keep it from record, the time begins to run from the day on which it is filed for record. *Exch. Nat. Bank of Columbus v. Harris, Ass.*, 14 N. B. R. 510; 1 Cin. Law Bul. 357; Fed. Cas. 4,595.

12. An officer of a corporation executed without authority a deed of trust of its property as security for a negotiable instrument more than four months prior to bankruptcy proceedings, and his act was ratified by the corporation, but within four months prior to the commencement of the proceedings. *Held*, that the security was a preference. In *re Kansas City Stone & Marble Co.*, 9 N. B. R. 76; Fed. Cas. 7,610.

13. Though a writing giving a preference, signed and acknowledged as a deed more than two months before bankruptcy by a bankrupt, but recorded within that period, may be valid, yet, if at the time of its being acknowledged there was a tacit agreement between the grantor and grantee that the writing was not to be a deed passing title until the grantee should so elect, and the

grantee did not make his election until a day within the period of two months, the deed is void. *Nat. Bank of F. v. Conway et al.*, 14 N. B. R. 175; 1 Hughes, 37; Fed. Cas. 10,037.

14. A mere agreement by a debtor, that in a certain event he will deliver to a bank such securities as he may purchase with the proceeds of overdrafts, will not vest a title to the securities in the bank, so that a transfer of them will not be a preference. *Payne et al. v. Solomon*, 14 N. B. R. 162; Fed. Cas. 10,856.

15. A general promise of security, given at the time a debt is contracted, may not be executed after the debtor has become insolvent. Such a promise will not save the act from being a preference, if it would have been one without the promise. *Ex parte Ames, In re McKay and Aldus*, 7 N. B. R. 230; 1 Lowell, 561; Fed. Cas. 333.

16. At the time a debt was contracted the debtor promised that he would give security when it might be asked. *Held*, that security could not be given after the debtor became insolvent. *Lloyd, Ass. etc., v. Strobbridge*, 16 N. B. R. 197; 10 Chi. Leg. News, 1; 1 San Fran. Law J. 13; Fed. Cas. 8,435.

17. A lender took an inchoate security — a confession of judgment — on a loan, and afterwards, on learning of the insolvency of the debtor, perfected his security by entering the same of record. *Held*, such perfecting of security was a preference, and prohibited. *Clark v. Iselin et al.*, 9 N. B. R. 19; 10 Blatchf. 204; 21 Pittsb. Leg. J. 82; Fed. Cas. 2,825.

18. Where, in an action by the assignee, the declaration alleged a payment by the bankrupt in liquidation of an existing debt, and to have been made to creditors with intent to give a preference, and within six, but not within four, months of the filing of the petition, *held*, that where the transaction is with a creditor, the four months' limitation applies; but where it is with a general purchaser, the six months' limitation governs, and that the declaration was demurrable (act of 1867). *Bean v. Brookmire*, 4 N. B. R. 57; 1 Dill. 25; 10 Amer. Law Reg. (N. S.) 181; 4 West. Jur. 392; Fed. Cas. 1,168.

19. The four months' clause of section 85 of the act of 1867 has reference to transfers with a view to a preference of one creditor

of an insolvent over another, which implies a past indebtedness. The six months' clause has reference to transfers of property by an insolvent to persons other than creditors, with a view to prevent his property from being distributed under the act and with a purpose to defeat its operation. *Barnewall & Gaynor, Ass., v. Jones et al.*, 14 N. B. R. 278; Fed. Cas. 1,027.

### III. EFFECT OF.

20. The receiving of a fraudulent preference on one of two discounted debts will not affect the creditor's right to prove the other. In *re Richter's Estate*, 4 N. B. R. 67; 1 Dill. 544; 8 Chi. Leg. News, 83; Fed. Cas. 11,803; In *re Lee*, 14 N. B. R. 89; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,179.

21. A creditor received in 1872 an illegal preference from an insolvent debtor. It was held that he was not entitled to prove his claim, the amendment of 1874 not being retroactive (1887). *Id.*

22. A creditor of a bankrupt, knowing he was insolvent, received preferences, and afterwards filed his claim for the amounts due him. The assignee raised the question that he was not entitled to prove. *Held*, that he could prove only a moiety of the debt. In *re Schoenenberger*, 15 N. B. R. 305; Fed. Cas. 12,473.

23. A preference will not bar the proof of a debt unless it was given and received by the parties to such debt. In *re Comstock & Co.*, 12 N. B. R. 110; 3 Sawy. 320; Fed. Cas. 3,079.

24. Every failing debtor who gives a preference to a part of his creditors thereby commits an act of bankruptcy, and such preference is not allowable. In *re Drummond*, 1 N. B. R. 10; 1 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 4,093.

25. A creditor who claims a preference contested by others is not eligible to be named as one of the committee to wind up the affairs. In *re Stuyvesant Bank*, 6 N. B. R. 272; 5 Ben. 566; Fed. Cas. 13,581.

26. Section 39 of the act of 1867 in effect prohibits an insolvent from giving any preference to one creditor over another, from any motive, upon pain of being declared a bankrupt on the petition of the injured cred-

itor or creditors. In *re Sutherland*, 1 N. B. R. 140; Deady, 344; Fed. Cas. 13,638.

27. A note given upon the consideration or with the intent specified in section 35 of the act of 1867 is void even in the hands of a *bona fide* purchaser. *Dalrymple v. Hillenbrand*, 17 N. B. R. 434.

27a. Under the act of 1867 an assignment for the benefit of creditors without preference under a state statute is an act of bankruptcy. *Boese v. King*, 108 U. S. 879.

### IV. ESSENTIAL TO ESTABLISH PREFERENCE.

See NOTICE, 10, IV.

#### (a) *In General.*

28. Actual fraud on the part of a creditor receiving an unlawful preference is something more than passive receipt of payment from an insolvent debtor, and the creditor must be an actor in the fraud. In *re Parker et al.*, 19 N. B. R. 340; Fed. Cas. 10,721.

29. To constitute the fraudulent preference condemned by the bankrupt act, there must be guilty collusion. *Clark, Ass., v. Iselin*, 11 N. B. R. 337; 21 Wall. 360.

30. A defendant bought from a bankrupt, shortly before commencement of proceedings, certain goods. The sale was made with evident intent to defraud creditors. In an action by the assignee to recover for the goods, it was held the burden of proof was on the plaintiff to show guilty collusion on the part of the defendants. *Dickinson v. Adams*, 17 N. B. R. 380; 4 Sawy. 257; Fed. Cas. 3,896.

31. The assignee, in proceedings to recover money or property obtained by way of a preference, under the thirty-fifth section of the act of 1867, must not only show the act of the bankrupt of which complaint is made, but also make it manifest that the transfer was made with a view to give a preference over other creditors, and that the creditor so favored knew the person making the transfer was insolvent. *Mays et al. v. Fritton*, 11 N. B. R. 229; 20 Wall. 414.

32. To render a conveyance within four months of the filing of a petition with a view to give a preference among creditors, or other conveyance made within six months, void, it is necessary that the person taking the con-



veyance should know that it was made in fraud of the act in the one case, and to prevent the property from coming to the assignee, or from being distributed under the act, in the other. *Campbell, Ass. v. White et al.*, 16 N. B. R. 98; 9 Ben. 166; Fed. Cas. 2,374.

33. To make a transfer of demands and accounts a fraudulent preference it must be shown that the debtors were at the time solvent or contemplated insolvency; that they made the transfer with a view to giving a preference, and that the transferee had reasonable cause to believe the transferor was insolvent, and knew that the transfer was in fraud of the provisions of the bankrupt law. *In re Broich et al.*, 15 N. B. R. 11; 7 Biss. 303; Fed. Cas. 1,921.

34. If one who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale or conveyance or transfer of money, or other property, estate, rights or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, etc., he can, on the petition of one or more creditors, be declared a bankrupt. *In re Pier-son*, 10 N. B. R. 107; Fed. Cas. 11,153.

35. In an involuntary proceeding the knowledge or motive of the preferred creditor is immaterial. *In re Oregon Bul. Pr. & Pub. Co.*, 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

36. It is not necessary to the invalidity of an act alleged to be preferential, which took place prior to December, 1873, that it shall meet the test imposed by the amendatory act of June, 1874. The limitation of the retroaction of section 12 of the latter act to the first day of December, 1873, excludes any other period for retroaction (1867). *Oxford Iron Co. v. Slafter, Ass. etc.*, 14 N. B. R. 380; 13 Blatchf. 455; Fed. Cas. 10,637.

#### (b) *Reasonable Cause to Infer Insolvency.*

37. The mere acceptance of a preference by a creditor does not preclude him from proving his debt or receiving dividends. In addition the creditor must have reasonable

cause to believe that the preference was made or given by the debtor contrary to a provision of the act. *In re Princeton*, 1 N. B. R. 178; 2 Biss. 116; 1 Amer. Law T. Rep. Bankr. 125; Fed. Cas. 11,433.

38. In an action to avoid a conveyance by a bankrupt on the ground that it was made to prefer a creditor, *held*, that it must be shown that the grantee had reasonable cause to believe that the grantor was insolvent, and that the conveyance was in fraud of the bankrupt act. *Barbour et al. v. Priest, Ass.*, 19 N. B. R. 518; 103 U. S. 293.

39. To render a mortgage made by an insolvent void as a preference, it must be affirmatively shown that the grantee had reasonable cause to believe that the grantor was insolvent at the time and that it was made with intent to defeat the bankrupt law. *Id.*

40. It constitutes fraud for a debtor to give a preference to a creditor within four months prior to the filing of the petition in bankruptcy, the debtor being insolvent and the creditor having reasonable cause to believe him so. *Kohlsaat v. Hoguet et al.*, 5 N. B. R. 159; 4 Ben. 565; Fed. Cas. 7,919.

41. A creditor who obtains a preference within four months, having reasonable cause to believe at the time that a fraud was intended and that the debtor was insolvent, loses both his preference and his chance to prove his debt in bankruptcy. *Bingham v. Richmond & Gills*, 6 N. B. R. 127; Fed. Cas. 1,415.

42. Ignorance of the law cannot avail creditors who are possessed of facts that show the insolvency of the debtor, and a preference received under such circumstances is fraudulent and void. *Martin v. Toof et al.*, 4 N. B. R. 158; 1 Dill. 203; Fed. Cas. 9,167.

43. A creditor to whom a conveyance has been made by an insolvent debtor need not have absolute knowledge of the fact of insolvency to defeat the conveyance, but only reasonable cause to know,—that is, that such a state of facts had been brought to his notice as would have led prudent business men to conclude that the debtor could not meet his obligations in the ordinary course of business. *Toof v. Martin*, 6 N. B. R. 49; 13 Wall. 40.

44. If a creditor had reasonable cause, when taking a preference, to believe the-

debtor insolvent, it makes no difference what he thought or knew of the debtor's intention in giving the preference. *Webb, Ass., v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

45. Any agreement by an insolvent debtor with a creditor to create a preference is void if the latter have cause to believe the debtor insolvent, and he is afterwards proceeded against under the bankrupt act. *Second Nat. Bank v. Hunt*, 4 N. B. R. 196; 11 Wall. 391.

46. Where a creditor is preferred in a settlement, the preference cannot be set aside unless it can be shown that the creditor receiving it had reasonable cause to believe a fraud on the bankrupt law was intended. *Castle, Ass., v. Lee*, 11 N. B. R. 80; Fed. Cas. 2,506.

47. A debtor who, at the execution of an instrument to secure a creditor, requested to be allowed to secure other creditors in the same instrument, gives notice of the existence of other creditors and of the debtor's inability to meet their demands. *Lloyd, Ass. etc., v. Strobridge*, 16 N. B. R. 197; 10 Chi. Leg. News, 1; 1 San Fran. Law J. 13; Fed. Cas. 8,435.

48. Where a judgment creditor had probable cause to believe the debtor insolvent, and that he suffered him to obtain judgment, execution and levy with intent to give him a preference in violation of the bankrupt act, an injunction restraining a sale of real estate upon such execution will be retained. *In re Bloss*, 4 N. B. R. 37; Fed. Cas. 1,562.

49. A creditor who, having reasonable cause to believe his debtor insolvent, receives payment, has reasonable cause to believe he is obtaining a preference; but persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him so, are not on the same footing, as they do not necessarily enable the debtor to contravene the act. *Darby's Tr. v. Lucas*, 5 N. B. R. 437; Fed. Cas. 3,572.

50. Where a merchant suffers a judgment by default, this fact is at least sufficient to put the creditor on inquiry as to the debtor's solvency, and he must be held chargeable with the knowledge he would have thus obtained. A preference obtained under such circumstances must be surrendered before

the claim is provable. *In re Forsyth v. Murtha*, 7 N. B. R. 174; Fed. Cas. 4,948.

51. In an action commenced before the passage of the amendment of June 22, 1874, a motion for new trial was made on the ground that the jury should have been instructed that they must find that the party "knew" the act was done in fraud of the provisions, instead that he "must have had reason to believe." *Held*, that where no other time is mentioned, the amendment should apply only to cases arising after its passage, and that where under the old statute the jury would be warranted in finding that the party had "reason to believe," they would be justified in finding that he "knew" under the amendment (1867). *Hamlin, Ass., v. Pettibone*, 10 N. B. R. 172; 6 Biss. 167; 10 Alb. Law J. 141; 20 Int. Rev. Rec. 73; 1 Cent. Law J. 404; 31 Leg. Int. 298; Fed. Cas. 5,995.

52. A bank demanded of a depositor having a note just due and others maturing, that to obtain an additional loan he should substitute small notes for the loan held by the bank and give small notes for the new loan to facilitate the obtaining of judgment for the amount of the debts. The new notes were payable immediately. The depositor had always been prompt in his payments. *Held*, that the bank had notice of his insolvency. *Loudon, Ass., v. Nat. Bank*, 15 N. B. R. 476; 2 Hughes, 420; Fed. Cas. 8,525.

53. A bill was filed by the assignee to set aside a deed given by the bankrupt on the ground that it was a fraudulent preference under section 35 of the act of 1867. A demurrer was filed on the ground that the bill did not allege that the defendant knew a fraud was intended, as specified in the amendatory act of June 22, 1874. The bill was filed in December, 1874, and the deed complained of was executed in December, 1873. The demurrer was sustained. *Singer, Ass., v. Sloan et al.*, 12 N. B. R. 208; 4 Dill. 110; 7 Chi. Leg. News, 231; 2 Cent. Law J. 218; Fed. Cas. 12,898.

53a. In order to invalidate a security taken by a creditor from an insolvent debtor, it is not sufficient that the creditor had some cause to suspect the insolvency of the debtor, but he must have such a knowledge of facts as to induce a reasonable belief thereof. *Grant, Ass., v. First National Bank of Monmouth*, 17 N. B. R. 496; 97 U. S. 80.

## V. FRAUD INVOLVED DEFINED.

See FRAUD, 39.

54. By the term "fraudulent preference," used in item 9 of section 29, is meant only a preference in fraud of the bankrupt act, that is, contrary to its provisions (1867). In re Rosenfield, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618; 1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,038.

55. The words "fraudulent preference," as used in section 5110, Revised Statutes, do not import moral fraud, but merely mean that a payment shall have been made under circumstances which the law inhibits as a preference. In re Seeley, 19 N. B. R. 1; Fed. Cas. 12,628.

56. A mere fraud on the bankrupt act by accepting a preference in violation of its provisions is not an actual fraud. In re Rior-den, 14 N. B. R. 332; Fed. Cas. 11,853.

## VI. INTENT.

See INTENT, 1-4.

57. The intent to prefer may be inferred from the fact of preference. Rison v. Knapp, 4 N. B. R. 114; 1 Dill. 186; Fed. Cas. 11,861.

58. It does not rebut the intent to prefer to show that the debtor has also another motive, namely, an expectation of future benefit to himself by means of future loans of money, and being enabled thereby to continue his business. *Id.*

59. To invalidate a transaction very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to such preference, may be sufficient. Sage v. Wyncoop, 104 U. S. 819.

60. To render a mortgage void it is not necessary that the debtor knew or believed himself insolvent. If insolvent in fact when he gives the mortgage, he gives it with the intention of giving a preference. Hall v. Wager & Fales, 5 N. B. R. 183; 5 West. Jur. 538; 3 Chi. Leg. News, 401; 3 Biss. 28; Fed. Cas. 5,951.

61. An intent to prefer a creditor cannot be deduced as an inference from the mere fact of preference, as the debtor may believe himself solvent. Root et al. v. Mastick, 2 N. B. R. 163.

62. When the act which is made the act of bankruptcy is a passive one, such as suffering property to be taken on legal process, when the debtor is insolvent, with intent to give a preference, if the natural and probable consequence of the act be to give the preference, it will be inferred that the debtor had such intent, and the burden of proof will be upon him to show the contrary. In re Black et al., 1 N. B. R. 81; 2 Ben. 196; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 1,457.

63. When an act is necessarily a preference, and insolvency is known, it is, *per se*, an intent to prefer or to defeat the act. Curran v. Munger, 6 N. B. R. 33; Fed. Cas. 8,487; Catlin v. Hoffman, 9 N. B. R. 342; 2 Sawy. 436; 21 Pittsb. Leg. J. 159; Fed. Cas. 2,521.

64. The transfer, by an insolvent debtor, of a large portion of his property to one creditor, with no provision for an equal distribution to all his creditors, is a preference, and is conclusive evidence that a preference was intended, unless the debtor can show that at the time he was ignorant of his insolvency, and that he could reasonably expect to pay all his debts, and the burden of proof is on him and not on the assignee or contestant in bankruptcy. Toof v. Martin, 6 N. B. R. 49; 13 Wall. 40.

65. The conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent so far as existing creditors are concerned. In re Alexander, 4 N. B. R. 45; 1 Lowell, 470; 18 Pittsb. Leg. J. 81; 3 Amer. Law T. Rep. 280; 1 Amer. Law T. Rep. Bankr. 238; Fed. Cas. 161.

66. If, after deducting the property which is the subject of the voluntary settlement, sufficient available assets be not left for the payment of the settlor's debts, the law infers intent to defraud. Sedgwick, Ass., v. Place et al., 5 N. B. R. 168; 5 Ben. 184; 3 Chi. Leg. News, 409; 4 Amer. Law T. Rep. (U. S. Cts.) 179; 6 Amer. Law Rev. 181; Fed. Cas. 12,620.

67. Procurement to take in execution may be inferred from such relationship between the debtor and creditor, and apparent concert of action on their part, as would ordinarily be incompatible with any other intention on the part of the debtor than that of giving a preference. In re Dunkle et al., 6 N. B. R. 72; Fed. Cas. 4,160.

68. A bankrupt exchanged with a cred-

itor two time notes and a chattel mortgage for demand notes. *Held*, that this was such an unequal exchange as to show intent to prefer. *Waring, Ass., v. Buchanan et al.*, 19 N. B. R. 502; Fed. Cas. 17,176.

69. Inasmuch as every man is presumed to intend the necessary consequences of his acts, a debtor who has paid one creditor to the exclusion of others cannot be heard to say that he did not intend to give a preference. Judgment may be given against a respondent whose answer sets up no other matter of defense than the denial of the intent, as upon failure to answer. In *re Silverman*, 4 N. B. R. 173; 2 Abb. (U.S.) 243; 1 Sawy. 410; 18 Int. Rev. Rec. 52; Fed. Cas. 12,853.

70. If a debtor suffer a creditor to do acts which will secure a preference and know the consequences, he intends them, because he can prevent them by using the means provided to effect an equal distribution of his property among his creditors. *Warren v. Tenth Nat. Bank et al.*, 7 N. B. R. 481; 10 Blatchf. 493; Fed. Cas. 17,202.

71. Very slight circumstances indicating the existence of an affirmative desire on a bankrupt's part to give a preference or to defeat the operation of the act may, by giving color to the whole transaction, make void a lien against his property. *Wilson v. Bank*, 9 N. B. R. 97; 17 Wall. 473.

72. When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the intention of the bankrupt is the turning point, and all the circumstances which go to show such intent should be considered. *Little, Ass., v. Alexander*, 12 N. B. R. 134; 21 Wall. 500.

73. In an action to recover that which has been conveyed as a preference under the bankruptcy act, the burden of proof is on the assignee, but the intent of the parties may be inferred from their acts. *Parsons v. Topliff*, 14 N. B. R. 547.

74. In an issue of fact to determine whether the respondent had, when insolvent, conveyed certain property to a creditor as a preference, the court instructed the jury that, to constitute a fraudulent preference, insolvency and an intent to make such preference must both exist. In *re Miller v. Keys*, 3 N. B. R. 54; Fed. Cas. 9,578.

75. The rule that every one is presumed to contemplate the necessary consequences of his acts is a presumption of fact, and where there are circumstances tending to show that a party did not, in paying a creditor, intend to prefer him, the question as to the actual intent may be left to the jury, notwithstanding the party was insolvent, and the necessary effect of his payment was to prefer. In *re Seeley*, 19 N. B. R. 1; Fed. Cas. 12,628.

76. Where it is shown that persons effecting transfers of property with a debtor had no intention of obtaining preferences, or the debtor of giving them, such transfers are not void under the bankrupt act. *Harmanson, Ass., v. Bain et al.*, 15 N. B. R. 173; 1 Hughes, 188; Fed. Cas. 6,072.

77. The bankrupt act of 1867 does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such loan, provided it be made *bona fide* and without any intent, or participation in any intent, to defraud creditors or defeat the bankrupt act. *Darby's Trustee v. Boatman's Sav. Inst.*, 4 N. B. R. 195; 1 Dill 141; 3 Chi. Leg. News, 249; 4 Amer. Law T. 117; 1 Leg. Op. 146; 1 Amer. Law T. Rep. Bankr. 251; Fed. Cas. 3,571.

78. A banker had permitted paper secured by a deed of trust to remain past due, and it came into the possession of a savings institution, by whom the realty was sold. *Held*, that although the defendant had reasonable cause to believe the banker insolvent, the latter's action was not intended to contravene the bankrupt act. *Darby's Trustees v. Lucas*, 5 N. B. R. 437; Fed. Cas. 3,572.

79. Where an insolvent debtor honestly believes that he shall be able to go on in his business, and with such belief pays a just debt without a design to give a preference, such payment is not fraudulent, although bankruptcy should subsequently ensue. In *re Gregg*, 4 N. B. R. 150; Fed. Cas. 5,797.

80. The question being in each case whether there was an intent to prefer, there may be cases in which the evidence of a real and honest intention not to stop payment may make valid a security given partly for money previously advanced, if coupled with sufficient present advantage to the debtor to

relieve the case of any fraudulent appearance. *Ex parte Ames*, *In re McKay* and *Aldus*, 7 N. B. R. 230; 1 Lowell, 561; Fed. Cas. 323.

81. An intent to evade the bankrupt act is not evinced by taking steps to obtain satisfaction by the ordinary course of law, even with knowledge on the part of the creditor that his debtor is insolvent; and in the absence of further facts, the party first obtaining possession of property can hold it against interference by the bankrupt court. *Appleton v. Bowles et al.*, 9 N. B. R. 354.

82. The intent to obtain a preference, accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not come within those provisions of the bankrupt act which impose penalties upon creditors who knowingly receive a preference. *In re Bousfield & Poole Mfg. Co.*, 16 N. B. R. 489; Fed. Cas. 1,703.

83. Where a creditor has secured judgments by default against a debtor whom it knew was insolvent, such judgments can only be sustained upon very close and satisfactory proofs to repel the legal presumption of actual or legal intent to give and to obtain a preference. *Warren v. D., L. & W. Ry. Co.*, 7 N. B. R. 451; 5 Chi. Leg. News, 205; 4 Leg. Op. 533; Fed. Cas. 17,194.

## VII. NOT FORBIDDEN.

84. A fraudulent conveyance made, or a fraudulent preference given, before the passage of the bankrupt act, is neither of them a good ground on which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29 of the act (1867). *In re Rosenfield*, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618; 1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,058.

85. Preferences created by United States laws are alone protected by section 28 of the bankrupt act (1867). *In re Stuyvesant Bank*, 9 N. B. R. 318; 1 Cent. Law J. 83; Fed. Cas. 13,584.

86. An insolvent debtor paid money due the government, within four months before filing his petition in bankruptcy, to the agent of the government, who had reasonable cause to believe that he was insolvent. *Held*, that payments to the government, although with intent to give a preference, are not forbidden

by the bankrupt act. *Tiffany et al., Ass., v. Morrison*, 18 N. B. R. 365.

87. When not absolutely prohibited by the bankrupt act, liens and preferences are entitled to the same protection from the bankrupt courts as other legal rights. *Barron et al. v. Morris, Ass.*, 14 N. B. R. 371; Fed. Cas. 1,055.

88. After the lapse of four months the simple preferences which an insolvent debtor may have made are to be held valid as against all the world so far as the preferred creditor is concerned. *Potter et al. v. Coggeshall*, 4 N. B. R. 19; Fed. Cas. 11,322; *In re Dow*, 6 N. B. R. 10; Fed. Cas. 4,036.

89. A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by law, but the possession must be obtained by a complete act within the limitation. *In re Foster*, 18 N. B. R. 64; 10 Chi. Leg. News, 315; Fed. Cas. 4,904.

90. A bankrupt transferred property to his wife, to whom he was indebted, preferring her above other creditors. *Held*, that the transfer was valid. *Van Kleeck, Ass., v. Miller et al.*, 19 N. B. R. 484; Fed. Cas. 16,860.

91. A claim which falls short in any particular of being within the statutory rule as to preference can have no standing in equity, as all valid preferences must rest either on a lawfully acquired lien, created before the filing of a petition, or else the consideration therefor must have been unequivocally in aid of the assignee after adjudication, or in aid of the proceeding in bankruptcy. *In re Nounnan & Co.*, 7 N. B. R. 15.

92. A mortgage executed by a debtor before becoming insolvent, and not in contemplation of bankruptcy, to secure to a creditor the payment of a debt previously contracted, although made with the intent to prefer said creditor, is not prohibited by section 39 of the act (1867). *Dunham v. Welch*, 2 N. B. R. 9; 2 Ben. 488; 1 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 4,143.

93. A payment by a debtor who is insolvent, more than four months before the filing of the petition in bankruptcy by or against him, although made to the creditor by way of preference, will be sustained as against the assignee under the first clause of the thirty-fifth section of the bankrupt act of 1867. *Maurer v. Frantz*, 4 N. B. R. 142.

## VIII. OBTAINED BY BANK.

## See BANKS, VII.

94. A bankrupt, having a deposit in the bank which held his note, gave to it his check for the amount so deposited, which was credited on the note. *Held*, a preference and void. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

95. Where a creditor, a bank, collects money due the bankrupt and gives the same to the sheriff, who applies it on the bank's judgment, a case of set-off does not arise, but the act is a fraudulent preference and the money can be recovered by the assignee. *Id.*

96. When a banker, according to his custom, charges his depositor in his deposit account for the notes or other obligations as they fall due, the transaction is valid only as between the banker and depositor, but if the depositor become bankrupt it might constitute an unlawful preference. *In re Warner et al.*, 5 N. B. R. 414; *Fed. Cas.* 17,177.

97. Where a bank took a deed from a depositor to secure it for an amount for which the depositor's account was overdrawn, knowing that he was unable to pay the overdraft, the deed was set aside as a fraudulent preference. *Alderdice, Ass. v. State Bank of Virginia et al.*, 11 N. B. R. 398; 1 *Hughes*, 47; *Fed. Cas.* 154.

98. A bank bought some of its own stock, and, having no right to hold it in its own name, parceled it out among the directors, one of whom gave his note. It was transferred to him on the books and he received the dividends, but the bank retained the certificate. He became insolvent and transferred the stock to the bank's teller, but the bank retained the note as an asset. The assignee brought an action to set aside the transfer as a preference. *Held*, that the bankrupt was not the owner of the shares, as the bank had no stock to convey. *Meyers, Ass. v. Bank*, 18 N. B. R. 84; *Fed. Cas.* 9,519.

99. A savings bank claimed a preference by way of first lien on the assets of an insolvent state bank created under a New York state statute, which provided "that upon its becoming insolvent, after paying its circulation, the assets should be first applied to paying deposits made with it by savings banks." *Held*, that such provision was a mere rule of

distribution in insolvency, creating no lien, and that such preferences are not protected by the bankrupt act, but are repealed thereby. *In re Stuyvesant Bank*, 9 N. B. R. 318; 1 *Cent. Law J.* 83; *Fed. Cas.* 13,584.

## IX. OBTAINED UNDER LEGAL PROCESS.

## See INSOLVENCY, 41.

(a) *Judgment—In General.*

100. Congress must be regarded as having intended, by the use of the words "insolvency" and "contemplation of insolvency" and "suffer," to strike at the root of all preferences, when the debtor is insolvent, or in contemplation of insolvency, by the taking of the debtor's property on legal process, whether the taking be by act of procurement or act of sufferance, where there is an intent to give such preference, and the creditor has reasonable cause to believe the debtor insolvent. *In re Black et al.*, 1 N. B. R. 81; 2 *Ben.* 196; 1 *Amer. Law T. Rep. Bankr.* 39; *Fed. Cas.* 1,457.

101. After an act of bankruptcy, of which a creditor has full knowledge, he cannot obtain a valid lien on the bankrupt's property in a state court to the exclusion of the other creditors (act of 1841). *Shawhan v. Wherritt*, 7 *How.* 627.

102. Since the amendment of June 23, 1874, it is not an act of bankruptcy for an insolvent debtor to "suffer" his property to be taken on legal process with intent to give a preference. The debtor being insolvent must "procure" his property to be taken on legal process with intent to give a preference or to defeat or delay operation of the act (1867). *In re Scull*, 10 N. B. R. 165; 10 *Alb. Law J.* 214; 1 *Amer. Law T. Rep.* 416; 20 *Int. Rev. Rec.* 80; 23 *Pittsb. Leg. J.* 84; *Fed. Cas.* 12,568.

103. Proceedings in bankruptcy dissolve an attachment issued within four months immediately preceding the commencement of such proceedings. *Duffield, Ass. etc., v. Horton et al.*, 19 N. B. R. 13.

104. A creditor, with reasonable cause to believe that a corporation, his debtor, was insolvent, sued it in a state court, with a view to secure payment, without regard to other creditors, knowing that, if he obtained payment in full, it must be at the expense of the

other creditors, and that he would secure a preference. *Held*, that a preference so obtained could be set aside at the suit of the assignee in bankruptcy of the corporation. *Smith v. Buchanan et al.*, 4 N. B. R. 133; 8 Blatchf. 153; 3 Alb. Law J. 97; Fed. Cas. 13,016.

105. Almost the entire capital of a debtor was money borrowed from his brother, who brought suit for an amount that would necessarily absorb the whole of it. Circumstantial evidence showed that the suit, apparently antagonistic, was collusive, the debtor being at the time insolvent, and the brother having reasonable cause to believe him so. The lien thus created was held void. *In re Baker*, 14 N. B. R. 433; 14 Alb. Law J. 294; Fed. Cas. 763.

106. A bankrupt gave a creditor new securities of much greater value, and the means of obtaining, by judgment and levy, a lien on his property, with intent to prefer him. *Held*, that the rule that exchange of securities is not a preference did not apply. *Waring, Ass. etc., v. Buchanan et al.*, 19 N. B. R. 502; Fed. Cas. 17,176.

107. Where a debtor is a son of a creditor and actively contributes to having a judgment reduced before it could have been done otherwise, *held*, that it is procuring his goods to be taken on execution within the meaning of the bankrupt act. *Rogers, Ass. v. Palmer*, 19 N. B. R. 471; 102 U. S. 263.

108. A creditor, knowing his debtor to be insolvent, recovered judgment against him, and caused execution and levy under which the personal property was sold. On petition of the debtor's assignee, *held*, that the debtor had committed an act of bankruptcy, and that the creditor had accepted a preference and should not be allowed to prove his debt. *In re Davidson*, 3 N. B. R. 106; 4 Ben. 10; Fed. Cas. 3,599.

109. A judgment obtained within four months before the filing of a petition in bankruptcy, in proceedings to subject a fund to the payment of a judgment against the bankrupt, is void; and the judgment creditor, having received the fund, less the costs of his action, is liable for the whole amount. *Street v. Dawson*, 4 N. B. R. 60; 2 Balt. Law Trans. 369; Fed. Cas. 13,533.

110. The taking of property on attach-

ment or execution is receiving a preference. The mere obtaining of judgment, however, is not. *In re Stevens*, 4 N. B. R. 122; 4 Ben. 513; Fed. Cas. 18,391.

111. A court will not permit a collusive agreement between the parties to a suit, in view of the impending bankruptcy of one of them, whereby the other party may absorb property that otherwise would go to the general creditors. *Samson, Ass. v. Burton et al.*, 5 N. B. R. 459; 5 Ben. 343; Fed. Cas. 12,286.

112. An insolvent substituted small notes payable immediately, for larger ones held by his bank, with intent to give a preference. This enabled the bank to obtain judgment and levy on his property more readily. The bank knew of the insolvency and demanded the substitution as a condition to a further loan. Judgment was obtained and the property seized. *Held*, that the preference was void, and that the amount realized on sale under execution must be paid to the assignee. *Loudon, Ass. v. First Nat. Bank, etc.*, 15 N. B. R. 476; 2 Hughes, 420; Fed. Cas. 8,525.

113. A state ordinance of North Carolina gave a preference to new debts over old, and thereafter a father gave to his son a new note to take the place of an old one, and thereon judgment was procured. Within four months thereafter a petition in bankruptcy was filed regarding the father. *Held*, the transaction constituted a preference. *Little, Ass. v. Alexander*, 12 N. B. R. 134; 21 Wall. 500.

114. A respondent gave his note and caused it to be sued upon for the purpose of preventing an attachment by the payee. *Held*, that it was an attempt to prefer such creditor. *In re Williams*, 3 N. B. R. 74; 1 Lowell, 406; Fed. Cas. 17,703.

115. A bankrupt gave new notes signed by himself in exchange for others secured by others, toward whom he and the payee were friendly, on which to be sued, and procured goods on credit from parties to whom his insolvency was unknown, in addition to his stock, that they might be taken in execution for his debt. The creditor to whom the new notes were given recovered judgment and issued execution. *Held*, that the debtor procured the execution to give preference to the creditor. *Sage, Jr. v. Wynkoop*, 16 N. B. R. 363; Fed. Cas. 12,215.

116. A bankrupt having suffered his property to be taken by legal process with intent to give a preference, the assignee obtained an order requiring the property levied on to be delivered into his hands. *Held*, that the proceeding by summary petition and order to show cause was irregular, and that it should have been by suit at law or bill in equity. In *re Ballou*, 3 N. B. R. 177; 4 Ben. 185; Fed. Cas. 818.

117. On prayer of one partner to the state court, a receiver was appointed to take possession of the partnership property and dispose of it for the benefit of all concerned. *Held*, a taking under legal process. *Hardy et al. v. Clark & Bininger*, 3 N. B. R. 99; 3 Amer. Law T. Rep. Bankr. 11; 17 Pittsb. Leg. J. 61; 2 Chi. Leg. News, 121; 1 Amer. Law T. Rep. Bankr. 151; 7 Blatchf. 262; Fed. Cas. 6,058.

118. The taking of the property of insolvent traders, by a receiver appointed by a state court, is a taking under legal process, within the meaning of section 39 of the bankrupt act of 1867. *Hardy et al. v. Bininger et al.*, 4 N. B. R. 77; Fed. Cas. 6,057.

#### (b) *Confession of Judgment.*

119. An insolvent debtor commits an act of bankruptcy by confessing judgment and allowing his property to be taken on an execution issued thereon, with intent to give a preference to a creditor. His insolvency or contemplation of insolvency must be averred and shown. In *re Craft*, 1 N. B. R. 89; 2 Ben. 214; Fed. Cas. 3,316.

120. If made with a view to prefer the creditor, it is an unlawful preference for an insolvent debtor to confess judgment, if it be actually followed by execution and seizure. *Webb, Ass., v. Sachs et al.*, 15 N. B. R. 168; 4 Sawy. 158; 9 Chi. Leg. News, 156; Fed. Cas. 17,325.

121. A debtor, being insolvent, confessed a judgment and procured and suffered his property to be taken on legal process, with intent to give a preference, the creditor, by his agent, knowing at the time of the giving of the preference that the debtor was insolvent. *Held*, that such creditor could not prove his debt when the debtor was adjudged a bankrupt within six months

of the giving of the preference, on the petition of the creditor. In *re Walton*, 4 N. B. R. 154; Deady, 598; 2 Amer. Law T. 121; 1 Amer. Law T. Rep. Bankr. 163; Fed. Cas. 17,180.

122. A debtor confessed a judgment within four months previous to the filing of the petition against him, being at the time insolvent, and the creditor having reason to believe him so, though there was as a consideration a pre-existing debt. *Held*, to be in fraud of the bankrupt act of 1867. *Vogel v. Lathrop*, 4 N. B. R. 146; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,985; 3 Pittsb. Rep. 268.

123. A confession of judgment entered prior to June 1, 1876, but after the approval of the bankrupt act of 1867, is a fraudulent preference if both parties knew of the debtor's insolvency. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

124. A judgment confessed by a debtor, who, being a merchant or trader, is unable to pay his debts in the ordinary course of trade, in favor of a creditor who knows of such inability, is a fraudulent preference, and the assignee may recover by summary proceedings the value of property sold under execution issued thereon (1867). *Wilson, Ass., v. Brinkman*, 2 N. B. R. 149; 1 Chi. Leg. News, 193; 2 Amer. Law T. Rep. Bankr. 65; Fed. Cas. 17,794.

125. A confession of judgment and the execution of a chattel mortgage by an insolvent debtor for the benefit of a creditor who knows, or has reasonable cause to believe, the debtor insolvent, is a fraudulent preference and deprives such creditor of the right to prove his claim, notwithstanding he may disclaim any benefit to accrue from and surrenders to the assignee such judgment and chattel mortgage. In *re Coleman*, 2 N. B. R. (3<sup>rd</sup> ed.) 172; 7 Blatchf. 192; Fed. Cas. 2,979.

#### (c) *Suffering Judgment.*

126. The words of section 39 of the act of 1867, in defining the act of bankruptcy, being "bankrupt or insolvent, or in contemplation of bankruptcy or insolvency," if the debtor be in any of these conditions when he makes the transfer of his property, or procures or suffers it to be taken on legal process with



intent to give a preference, he commits an act of bankruptcy, and the assignee may recover the property. *In re Black et al.*, 1 N. B. R. 81; 2 Ben. 196; 1 Amer. Law T. Rep. Bankr. 39; Fed. Cas. 1,457.

127. When a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer its property to be taken on legal process with intent to give a preference to a creditor of the firm. *Id.*

128. Passive acquiescence in the seizure of his property in execution by an insolvent debtor, when he could prevent it by going into voluntary bankruptcy, is suffering it to be taken with intent to give a preference, and the act is therefore void. *In re Lord*, 5 N. B. R. 318; Fed. Cas. 8,503; *Haskell, Ass. etc., v. Ingalls*, 5 N. B. R. 205; 1 Hask. 341; Fed. Cas. 6,193; *In re Wells*, 8 N. B. R. 95; 2 Chi. Leg. News, 49; Fed. Cas. 17,388.

129. A person suffers that to be done which he has the power to prevent and does not; therefore an insolvent debtor who does not go into voluntary bankruptcy, but against whom a judgment by default is obtained, suffers his property to be taken in execution with intent to give a preference, although the judgment was obtained against his will. *In re Forsyth et al.*, 7 N. B. R. 174; Fed. Cas. 4,948.

130. Passive acquiescence in the seizure of his property in execution by an insolvent debtor, when he could prevent it by going into voluntary bankruptcy, amounts to suffering it to be taken with intent to give a preference within the meaning of section 39 of the bankrupt act of 1867. *Vogel v. Lathrop*, 4 N. B. R. 146; 8 Pittsb. Rep. 268; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,985.

131. Where an officer of a corporation knew of its insolvent condition, and suffered judgments to be taken and executions to be issued and levied, one after another for many weeks, by one creditor, without giving notice to others that they might institute proceedings in bankruptcy, he cannot be allowed to say that he did not intend to give a preference. *Warren v. D. L. & W. Ry. Co.*, 7 N. B. R. 451; 5 Chi. Leg. News, 205; 4 Leg. Op. 533; Fed. Cas. 17,194.

132. A judgment was obtained, for want of an answer, against an insolvent debtor, being docketed in the lien docket, so as to become a lien upon such debtor's real prop-

erty. *Held*, that the creation of such lien was with the implied consent of the debtor, and therefore void, under the first clause of section 35 of the act of 1867, as a transfer by him to the creditor. *Catlin v. Hoffman*, 9 N. B. R. 342; 2 Sawy. 486; 21 Pittsb. Leg. J. 159; Fed. Cas. 2,521.

133. A mercantile firm had no property but their stock in trade, and, being pressed for payment, replied that they were unable to pay. Thereupon suit was brought and judgment obtained by default, less than four months prior to their petition in bankruptcy. *Held*, the assignee should recover. *Wilson, Ass., v. Bank*, 5 N. B. R. 270.

134. Where a bankrupt had absconded, and suits had been commenced against him by attachment of his property and publication of the summons, and he met a creditor and his own attorney in Canada, at Niagara Falls, and accompanied them to the American side, where the summonses were served on which judgments were entered, *held*, that he had procured the property to be seized with intent to give a preference, and that the judgments were therefore void. *Beattie v. Gardner et al.*, 4 N. B. R. 106; 4 Ben. 479; Fed. Cas. 1,195.

#### (d) *Warrant of Attorney.*

##### See POWER OF ATTORNEY, II.

135. Where a creditor holding a warrant to confess judgment causes execution thereon after notice of facts making it reasonable to believe the debtor is insolvent, he is guilty of intending a fraud upon the bankrupt act. *Golson et al. v. Neihoff et al.*, 5 N. B. R. 56; 2 Biss. 434; Fed. Cas. 5,524.

136. Preference by means of a judgment note is not obtained until execution thereon. *Id.*

137. A power of attorney to confess judgment is a security within the meaning of the act of 1841, and if given in contemplation of bankruptcy can be set aside on the suit of the assignee. The execution of such a power of attorney is not of itself an act of bankruptcy if done unwillingly. *Buckingham v. McLean*, 18 How. 151.

138. In bankruptcy proceedings, it appeared that a judgment was entered upon bankrupt's warrant of attorney to confess.

*Held*, a preference. *Zahn v. Fry et al.*, 9 N. B. R. 546; 10 Phila. 243; 31 Leg. Int. 197; 21 Pittsb. Leg. J. 155; Fed. Cas. 18,198.

139. Where the debtor does the least act whereby a preference is facilitated, as where a judgment is entered upon his warrant of attorney to confess, the transaction is void. *Id.*

140. Evidence that the debtor signed and delivered to the defendants a judgment note, payable one day after date, giving them the right to enter the same of record, and issue execution thereon without delay for a debt not then due, affords a strong ground to presume that the debtor intended to give the creditor a preference, and that the latter intended to obtain it; and it is wholly immaterial whether the preference was voluntary or was given at the urgent solicitation of the creditor. *First Nat. Bank of Clarion v. Jones, Ass.*, 11 N. B. R. 381; 21 Wall. 325.

141. Where a creditor secures judgment on a judgment note, execution is issued and property is seized and sold, the measure of damages is the value of the property so sold. *Id.*

142. Where a debtor has given a judgment note to one of his creditors who has taken judgment on the note and so obtained a preference, it is wholly immaterial whether the course pursued by the judgment creditor in entering the judgment and issuing execution was expected or unexpected to the debtor, as he had given him power to do what he did in spite of every opposition which he could make. *Id.*

143. Warrants were held by near relations of a bankrupt and he had stated to creditors that they could make nothing by pushing, as his relations had judgments and he should protect them first, and also that his relations entered their judgments and issued executions thereon immediately on learning of the bankrupt's condition. *Held*, that the executions were procured by bankrupt. *Shimer, Ass. v. Huber et al.*, 19 N. B. R. 414; 14 Phila. 402; 36 Leg. Int. 339; 8 Reporter, 398; Fed. Cas. 12,787.

144. A member of an insolvent firm, having knowledge of the insolvency, at the request of a creditor holding the firm's judgment note, unwillingly carried a message from the creditor to an attorney, directing him to enter judgment on the note. *Held*,

that he had procured entry of judgment. *In re Benton & Bro.*, 16 N. B. R. 75; 3 Wkly. Notes Cas. 547; Fed. Cas. 1,333.

145. Where one creditor obtained notes with warrant of attorney to confess judgment and did so confess judgment and issued execution and made a levy, knowing the debtor was insolvent, he obtained a preference which would be set aside. *In re Herpich*, 15 N. B. R. 426; 7 Biss. 387; 9 Chi. Leg. News, 253; 4 Law & Eq. Rep. 29; Fed. Cas. 6,418; *In re Terry et al.*, 4 N. B. R. 33; 2 Biss. 356; 3 Chi. Leg. News, 106; Fed. Cas. 13,835; *Campbell v. Traders' Nat. Bank*, 3 N. B. R. 124; 2 Chi. Leg. News, 148; 1 Md. Law Rep. 169; 2 Biss. 423; Fed. Cas. 2,370.

146. Notes with cognovit to confess judgment thereon by an insolvent debtor to a creditor who had refused him further credit, and a few days later caused judgment to be entered and execution issued thereon, constitute a fraudulent preference. *Haughey, Ass. v. Albin*, 2 N. B. R. 129; 2 Bond, 244; 2 Amer. Law T. Rep. Bankr. 47; Fed. Cas. 6,222.

147. A warrant of attorney to confess judgment given by debtors who know themselves to be insolvent, and suffer their property to be levied on by virtue of an execution issued thereon, with intent to give a preference thereby to creditors, is an act of bankruptcy. *In re Dibble*, 2 N. B. R. 185; 3 Ben. 233; 1 Chi. Leg. News, 355; Fed. Cas. 3,884.

148. A warrant of attorney to confess judgment on a promissory note, payable one day after date, executed by an insolvent debtor in satisfaction of an indebtedness previously contracted, is a fraudulent preference, and a levy by virtue of an execution issued upon a judgment entered by such confession is void. *Fitch v. McGie*, 2 N. B. R. 164; 2 Amer. Law T. Rep. Bankr. 80; Fed. Cas. 4,835.

149. Where one constituted attorney for the collection of a debt procured from the debtor a judgment note for the amount in his own name, and entered it, knowing the debtor was insolvent, there being a clear intent to give a preference, though the fact of insolvency was not directly known to the real creditors, such knowledge is imputable to them and the judgment is invalid. *Vogel v. Lathrop*, 4 N. B. R. 146; 3 Pittsb. Rep. 268; 18 Pittsb. Leg. J. 106; Fed. Cas. 16,935.

## X. OBTAINED THROUGH PAYMENT.

## See PAYMENT, I.

150. A payment made by a debtor to a creditor who has committed an act of bankruptcy, and against whom proceedings in bankruptcy have been instituted, but who has not yet been adjudged a bankrupt, will not be valid in the event of an adjudication of bankruptcy in such proceedings if the payment transpired subsequent to the filing of the petition. Opinion of Attorney-General, 9 N. B. R. 117.

151. A payment of debtors who are insolvent and contemplating bankruptcy is a fraudulent preference and an act of bankruptcy, notwithstanding it is made on a fiduciary debt. In re Dibble, 2 N. B. R. 185; 3 Bn. 283; 1 Chi. Leg. News, 355; Fed. Cas. 3,884.

152. A payment by an insolvent debtor is a preference, although made to a holder of a note over due, on which the liability of the solvent indorser has been fixed by protest and notice. Bartholow v. Bean, 10 N. B. R. 241; 18 Wall. 635.

153. A payment by a debtor who knows that he is insolvent, by procuring an order for material from a creditor for the express purpose of discharging the indebtedness, is a fraudulent preference. Farrin v. Crawford et al., 2 N. B. R. 181; 7 Chi. Leg. News, 342; Fed. Cas. 4,686.

154. A debtor's liabilities exceeded his assets, and he had ceased to meet his liabilities as they came due, but for a month he continued business and paid money to two creditors. Held, such payment constituted a preference that defeated a discharge under section 29 (1867). In re Warner et al., 5 N. B. R. 414; Fed. Cas. 17,177.

155. A debtor who has grounds for believing that he is insolvent, and, acting on such belief, makes a payment to one creditor two days prior to his failure, is not entitled to a discharge in bankruptcy, such payment being a preference of such creditor over the others. In re Doyle, 3 N. B. R. 158; Fed. Cas. 4,051.

156. An indorser of a bankrupt note, who, having reasonable cause to believe the maker insolvent, receives from him money to secure his liability as indorser, accepts a preference in fraud of the bankrupt act, and the amount

so paid may be recovered by the assignee. Ahl, Jr., et al. v. Thorner, 8 N. B. R. 29; 2 Bond, 287; 16 Pittsb. Leg. J. 78; 2 Amer. Law T. 104; 1 Chi. Leg. News, 337; 1 Amer. Law T. Rep. Bankr. 129; Fed. Cas. 103.

157. The proposition is untenable that a debtor ceases to be insolvent because, being unable to pay his debts in the regular course of business, his creditors have agreed to extend the time of payment; or that the payment of the debt by one who is insolvent cannot be regarded as a preference if made with the expectation that he will be able eventually to pay all his debts in full. Rison v. Knapp, 4 N. B. R. 114; 1 Dill. 186; Fed. Cas. 11,861.

158. A debtor whose assets consisted of a stock of small value, a small quantity of incumbered land, half of which he had exempted under the state homestead law, a lot of small value, and book accounts and notes, the value of all being greatly less than his indebtedness, borrowed upon his stock in trade and his homestead, and discharged a prior indebtedness therefor, and later paid a creditor the amount of his debt from his stock. Held, these transactions constituted a fraudulent preference, and were sufficient ground for withholding a discharge. In re Gay, 2 N. B. R. 114; 1 Hask. 108; 1 Amer. Law T. Rep. Bankr. 73; 2 Amer. Law T. Rep. Bankr. 52; Fed. Cas. 5,279.

## XI. OBTAINED UNDER PRESSURE.

## See DEED, 1.

159. The fact that an assignment to one creditor is made under pressure does not ameliorate the fact that it is a preference over other creditors. In re Batchelder, 3 N. B. R. 37; 1 Lowell, 373; Fed. Cas. 1,098.

160. The fact that an assignment or transfer of goods to a creditor was made to avert a threatened attachment does not save such transaction from being an illegal preference, if such was its effect. Id.

161. A forced assignment of all property to a creditor is a preference and an act of bankruptcy, and such creditor is charged with knowledge of the insolvency of the assignor. Grow, Ass., v. Ballard et al., 2 N. B. R. 69; 1 Amer. Law T. Rep. Bankr. 111; Fed. Cas. 5,848.

162. If a trader be insolvent and know that fact, and one of his creditors knowing the fact presses him for payment, and such payment be made, the transaction is a fraud upon the bankrupt act and the other creditors of the debtor. *Rison v. Knapp*, 4 N. B. R. 114; 1 Dill 186; Fed. Cas. 11,861.

163. A bankrupt being indebted to a bank, and having funds there, committed forgery. The bank hearing of it compelled an immediate transfer of the funds to it, and also attached moneys belonging to him in other banks. The bank knew of his insolvency. *Held*, to be preferences. *West Phila. Bank v. Dickson et al.*, Ass. etc., 17 N. B. R. 482; 95 U. S. 180.

164. Whether a preference be voluntary or involuntary, or by reason of threats or coercion, is wholly immaterial. *Strain v. Gourdin et al.*, 11 N. B. R. 156; 2 Woods, 380; Fed. Cas. 13,521.

165. The bankrupt procures his goods to be taken in execution when the initiation of the proceedings comes from him, he being the person who begins to procure, when he causes the thing to be done, in the ordinary sense of the word. The signing under strong pressure of a warrant to confess a judgment is suffering, and not procuring, goods to be taken in execution. *In re Black et al.*, 1 N. B. R. 81; 2 Ben. 196; 1 Amer. Law T. Rep. Bankr. 39; Fed. Cas. 1,457.

## XII. OBTAINED THROUGH SALE.

See SALES, 45, 46, 72, 123.

166. A sale or transfer by a bankrupt of property to his brother, who was aware of the bankrupt's insolvency, in payment of a debt due to him, although such sale and transfer were necessary to save the property from destruction, is a fraudulent preference. *Brock v. Terrell*, 2 N. B. R. 190; 1 Chi. Leg. News, 349; Fed. Cas. 1,914.

167. The sale of goods by a debtor to a creditor who has reasonable cause to believe the former insolvent, with intent to prefer him, is void. *In re McDonough White, Ass., v. Raferty*, 3 N. B. R. 53; 1 Chi. Leg. News, 361; 16 Pittsb. Leg. J. (O. S.) 110; Fed. Cas. 8,775.

168. Where an insolvent debtor executed a bill of sale to a creditor who had obtained

the levy of an attachment after notice of the debtor's insolvency, the same was a violation of the bankrupt act of 1867, its inevitable effect being to give a preference. *In re Gregg*, 4 N. B. R. 150; Fed. Cas. 5,797.

169. Where household furniture in a dwelling inhabited by the owner and another was transferred to such other person by bill of sale and pointing out the property, but without other circumstances to indicate an actual change of possession, and the parties continued to dwell together and to use the furniture as before, *held*, that the transaction was void against creditors. *Allen v. Massey*, 4 N. B. R. 75; 1 Dill 40; 2 Chi. Leg. News, 309; Fed. Cas. 231.

170. A sale of property to an indorser of a note is void where judgment has been recovered against the maker, his property is held under levy, and the note has been protested. *Cookinham et al. v. Morgan et al.*, 5 N. B. R. 16; 7 Blatchf. 480; Fed. Cas. 3,183.

171. H., an indorser of A.'s note which had been discounted by a bank, purchased of him a quantity of flour, stipulating that as a condition of the sale the purchase-money should be applied to the payment of the note. *Held*, that the sale was a preference and that H. had reasonable cause to believe A. insolvent and contemplating bankruptcy. *In re Arnold*, 2 N. B. R. 61; Fed. Cas. 551.

## XIII. OBTAINED THROUGH SECURITY.

See SECURED CLAIMS, 10.

### (a) *In General.*

172. An assignment of a claim to secure a pre-existing indebtedness, and not as a pledge of security made at the time of contracting the indebtedness and as a part of the transaction, made when insolvent and in contemplation of bankruptcy, is a fraudulent preference and ground for withholding a discharge. *In re Foster*, 2 N. B. R. 81; 1 Amer. Law T. Rep. Bankr. 127; 1 Chi. Leg. News, 103; Fed. Cas. 4,961.

173. The fact that securities, obtained from one debtor by an obligor on a bond, to indemnify his sureties, were made to run directly to such sureties, does not deprive the transaction of its character as a preference, when they were obtained at the in-

stance of the obligor, the substance rather than the form being the test. *Smith v. Little*, 9 N. B. R. 111; 5 Biss. 490; 6 Chi. Leg. News, 86; Fed. Cas. 18,072.

174. An insolvent debtor transferred to the holder of his check a bond, a mortgage and promissory notes. *Held*, that if such transfer were out of the ordinary course of business, it was *prima facie* fraudulent, and the burden of proving that it was not so was on the transferee. *Collins & Farrington, Ass., v. Bell et al.*, 8 N. B. R. 146; Fed. Cas. 3,010.

175. A banker who sells his sight draft, and on the day following gives to the holder collateral security for its payment, thereby gives a preference in violation of the bankrupt act. *Merchants' Nat. Bank of Cincinnati v. Cook et al.*, 16 N. B. R. 391; 95 U. S. 342.

#### (b) *Mortgage.*

176. Where a mortgage subsequently given to cover property afterward acquired is void under the bankrupt act, it is not rendered valid by authority therein for the mortgagee to take possession, but amounts to a preference. *In re Eldridge*, 4 N. B. R. 162; 2 Biss. 362; 8 Chi. Leg. News, 177; Fed. Cas. 4,330.

177. A chattel mortgage that under the state law is void as against creditors, and under which the mortgagee has taken possession before commencement of proceedings in bankruptcy, having reasonable cause at the time of taking the mortgage for believing the debtor insolvent, is a preference and void. *Harvey, Ass., v. Crane*, 5 N. B. R. 218; 2 Biss. 496; 8 Chi. Leg. News, 341; Fed. Cas. 6,178.

178. Where a creditor, within four months of bankruptcy proceedings, advanced money and took a chattel mortgage as security therefor, and also for a prior debt due himself, and for an overdue note, the same was held to be a preference, but could be sustained in part. *In re Stowe*, 6 N. B. R. 429; Fed. Cas. 18,518.

179. A mortgage of all the property of a firm and its members, given to secure a loan with which to pay debts due and unpaid, and in anticipation of others soon to mature,

for a number of which the mortgagee is responsible as surety, is void; and the mortgagee will be presumed to know that the mortgagor is insolvent, if in fact he is. *Scammon, Ass., v. Cole et al.*, 3 N. B. R. 100; 1 Hask. 214; Fed. Cas. 12,433.

180. A mortgage was given to secure two promissory notes that had been indorsed by the mortgagees, the mortgage being given less than four months next preceding the filing of a petition in bankruptcy. *Held*, the conveyance was void. *Scammon, Ass., v. Cole et al.*, 5 N. B. R. 257; 3 Cliff. 472; Fed. Cas. 12,432.

181. A mortgage was executed by a debtor to secure the mortgagee for his claim and for a present loan made to enable the debtor to discharge claims of third parties, such discharge amounting to a preference. In an action by the assignee to have the mortgage declared void, *held*, that the conveyance was void. *Buchnam, Ass., v. Goss*, 18 N. B. R. 387; 1 Hask. 630; Fed. Cas. 2,097.

182. A mortgage given to secure a pre-existing debt is void where the mortgagee has reasonable cause to believe the mortgagor insolvent, and it is immaterial whether such security be given voluntarily or in pursuance of a previous promise made when the debt was contracted and when the debtor was solvent. *In re Graham, Ass., v. Stark et al.*, 3 N. B. R. 92; 3 Ben. 520; 2 Chi. Leg. News, 73; Fed. Cas. 5,676.

183. A bill was filed by the assignee to set aside a mortgage given by the bankrupt to secure to a bank a pre-existing indebtedness, there being circumstances sufficient to put the bank on inquiry as to the mortgagor's solvency, and at that time an action by the government against the bankrupt was pending, being subsequently followed by a judgment for the government. *Held*, that the giving of the mortgage was a preference, that it be declared void, and that the bank be required to satisfy the same of record. *Burfee v. First Nat. Bank of Janesville*, 9 N. B. R. 314.

184. Where a subsequent and prior mortgage do not cover the same goods, the former is liable to be set aside as a preference as to all goods not included in the latter. *Brett v. Carter*, 14 N. B. R. 301; 2 Lowell, 458; 2

N. Y. Wkly. Dig. 831; 23 Int. Rev. Rec. 152; 8 Cent. Law J. 886, 13 Alb. Law J. 861; 10 Amer. Law Rev. 600; Fed. Cas. 1,844.

185. A mortgage to secure a sale that contains no provisions by which the collections and proceeds of sale shall be applied to the purposes of the conveyance, or to the payment of the debt to be secured, or indemnity to be provided, or by its reinvestment to augment the trust fund, the want thereof being inconsistent with the alleged purpose of the conveyance, is void as to creditors in bankruptcy. *Smith, Ass., v. McLean et al.*, 10 N. B. R. 260; Fed. Cas. 13,074.

186. Where a creditor petitions that debts proved by respondents, who are also creditors, be disallowed, on the ground of having taken a mortgage to secure their debts within four months of adjudication, *held*, that the mortgage was a preference in fraud of the bankrupt act of 1867. *Phelps v. Sterns*, 4 N. B. R. 7; Fed. Cas. 11,080.

187. A., being insolvent to the knowledge of B., within four months of bankruptcy executed a second mortgage to B., in substitution of the first. *Held*, a preference, and that B. could not enforce his lien against property in the assignee's hands. *In re Jordan*, 9 N. B. R. 416; Fed. Cas. 7,529.

188. A conveyance by chattel mortgage to secure the payment of a debt previously contracted, a short while after the execution whereof payment is suspended by the debtor, is a fraudulent preference and an act of bankruptcy. *In re Rogers*, 2 N. B. R. 129; 1 Chi. Leg. News, 195; Fed. Cas. 12,002.

189. A debtor, a retail druggist, in January, 1878, executed a chattel mortgage to indemnify a surety on a note covering the stock in trade. On May 20th the mortgagee took possession on the ground that he was dissatisfied with the way the business was run. On June 4th a petition in involuntary bankruptcy was filed. *Held*, that the mortgage and seizure were acts of bankruptcy, the first a fraudulent conveyance, and the second an unlawful preference. *In re Foster*, 18 N. B. R. 64; 10 Chi. Leg. News, 315; Fed. Cas. 4,964.

190. S., a bankrupt, two months prior to the commencement of proceedings, mortgaged his stock of goods, it being understood beforehand that the consideration received

should be paid to and accepted by a creditor for the same sum at which he received it, the mortgagee and creditor being present and active in the negotiation with the bankrupt. *Held*, that the *onus* of showing "good faith" and "actual value," within the meaning of the Revised Statutes, section 5128, was upon the mortgagee, and that he would not be allowed to enforce the mortgage. *In re Sims*, 19 N. B. R. 57; Fed. Cas. 12,689.

#### XIV. ATTAINED THROUGH TRANSFER OF MERCHANDISE.

191. The bankrupts, after insolvency, transferred merchandise in place of goods previously abstracted. *Held*, an unlawful preference. *Sharp, Ass. etc., v. The Phila. Warehouse Co.*, 19 N. B. R. 378.

192. After a bankrupt's paper had been protested for non-payment, and a portion of his stock in trade had been seized for violation of the revenue laws, he began immediately to turn over the remainder of his stock to several creditors in payment of their indebtedness. *Held*, that at the time of such transfer he had reason to believe that he was insolvent, and that it was a fraudulent preference of such creditors. *In re Lewis et al.*, 2 N. B. R. 145.

193. A conveyance of the whole of a trader's property, or of the whole, with a colorable exception, made to a creditor, as a security for a pre-existing debt, is fraudulent and void, not only because he deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of other creditors, but because such a conveyance must either be fraudulent, kept secret, or produce an immediate absolute bankruptcy. *Rison v. Knapp*, 4 N. B. R. 114; 1 Dill. 186; Fed. Cas. 11,861.

194. A conveyance by insolvent partners of all their joint property to creditors who have reasonable cause to believe that their debtors are insolvent cannot be avoided by the assignee in bankruptcy of one of the former partners. *Forsaith, Ass., v. Merritt*, 8 N. B. R. 11; 1 Lowell, 836; 2 Amer. Law T. 123; 1 Amer. Law T. Rep. Bankr. 168; Fed. Cas. 4,946.

195. A creditor who, having reasonable cause to believe his debtor insolvent, receives

-an assignment of his account against a third party which he collects, or goods to be applied to part payment of the debt, receives a preference, and will not be allowed to prove his debt without surrendering to the assignee the money or goods received. *In re Kingsbury et al.*, 3 N. B. R. 84; Fed. Cas. 7,816.

196. A contract of purchase was made abroad, to be performed abroad. The goods, being the property of the bankrupt and in the United States, were transferred to an alien creditor in the United States. *Held*, that the conveyance was in fraud of the bankrupt act. *Olcott, Ass. v. MacLean et al.*, 14 N. B. R. 379.

197. Where a transfer to a factor is made with intent to give him a preference and so that it may become subject to his lien, it may be set aside. *Nudd et al. v. Burrows, Ass.*, 13 N. B. R. 389; 91 U. S. 426.

198. Delivery of goods under a mortgage, itself fraudulent, is a violation of the preference clause of the bankrupt act and the goods cannot be held as a pledge. *Robinson et al. v. Elliott, Ass.*, 11 N. B. R. 553; 23 Wall. 513.

## XV. SURRENDER OF.

### (a) *In General.*

199. If a mortgage be given to a preferred creditor without his knowledge, or if a creditor upon receipt of knowledge of such preference repudiate it, the penalty of the law in respect of his debt is not to be enforced against him. *In re Princeton*, 1 N. B. R. 178; 2 Biss. 116; 1 Amer. Law T. Rep. Bankr. 125; Fed. Cas. 11,433.

200. The surrender by one who has obtained a preference to the assignee, of his preference, is sufficient to entitle him to receive a dividend on his debt, although such surrender is made after litigating the matter with the assignee. *Streeter v. Bank*, 147 U. S. 37.

201. There is only constructive fraud where a creditor voluntarily restores a preference, and he will be permitted to share *pro rata* in the estate. *In re Schoenenberger*, 15 N. B. R. 305; Fed. Cas. 12,473.

202. A creditor having reasonable cause to believe the debtor insolvent accepted a

bill of sale of all his stock in trade, and of all his books of account. He subsequently surrendered them to the assignee. *Held*, that he was entitled to prove his claim. *In re Montgomery*, 3 N. B. R. 97; Fed. Cas. 9,728.

203. Creditors who had been preferred by the bankrupts offered the same debt for proof, the preference having been recovered of them by the assignee and paid on execution. The debt was admitted for proof. *In re Black et al.*, 17 N. B. R. 899; Fed. Cas. 1,459.

204. If the preferred creditor surrender his preference before the entry of the judgment, but after the opinion is given, where the debt is tried before the court, he may prove his debt where there is only constructive fraud, but he may be required to pay the expenses of the assignee. *Burr v. Hopkins, Ass.*, 12 N. B. R. 211; 6 Biss. 345; 7 Chi. Leg. News, 266; Fed. Cas. 2,192.

205. A full surrender of a fraudulent preference by a creditor is a complete condonation of that offense. Section 23 (act of 1867) is not limited in its operations to cases of voluntary proceedings. *In re Stephens*, 6 N. B. R. 533; 3 Biss. 187; Fed. Cas. 13,365; *In re Leland et al.*, 9 N. B. R. 209; 7 Ben. 156; Fed. Cas. 8,230.

206. The same effect is given to the act of a creditor who surrenders his rights under a fraudulent conveyance as the setting aside of the deed would have had; such surrender is covered by the provisions of section 23 of the bankrupt act, and is not a mere assent for the unsecured creditors to participate in the proceeds of his preference (1867). *In re Detert*, 11 N. B. R. 293; 7 Chi. Leg. News, 180; 14 Amer. Law Reg. (N. S.) 166; Fed. Cas. 3,829.

207. One who has received a preference in fraud of the bankrupt act cannot vote for assignee, and can surrender his preference only to the assignee so as to prove his claim against the bankrupt's estate. *In re Parham et al.*, 17 N. B. R. 300; Fed. Cas. 10,712.

208. A creditor received a preference by way of assignment of property of the debtor when it was alleged he had reasonable cause to believe the debtor insolvent. *Held*, the creditor would have to surrender such property before proving his claim. *Ecker v. McAllister*, 17 N. B. R. 42.

(b) *What is Not.*

209. A creditor who resists a suit by the assignee to recover an alleged fraudulent preference cannot prove his claim where he is defeated in the action, though he pay the judgment recovered, such payment not being a surrender as contemplated by section 23 of the bankrupt act of 1867. In *re Richter's Estate*, 4 N. B. R. 67; 1 Dill. 544; 3 Chi. Leg. News, 33; Fed. Cas. 11,803.

(c) *When Cannot be Made.*

210. Creditors having reasonable cause to believe a creditor insolvent and accepting chattel mortgages from him to secure their debts, thereby participating in such fraud as to found a proceeding against him in bankruptcy, will not be permitted to relinquish their intended preferences to prove their debts under section 23 or any other section of the act (1867). In *re Princeton*, 1 N. B. R. 178; 2 Biss. 116; 1 Amer. Law T. Rep. Bankr. 125; Fed. Cas. 11,433.

211. The surrender of a preference cannot be made after a recovery has been had under sections 35 and 39; and the absolute prohibition contained in the last clause of section 39 applies only after such recovery, viz., by judgment or decree (1867). In *re Kipp*, 4 N. B. R. 190; 4 Amer. Law T. 60; 1 Amer. Law T. Rep. Bankr. 246; Fed. Cas. 7,836.

212. A creditor accepted a chattel mortgage with a view to obtain a preference, having reasonable cause at the time to believe his debtor insolvent and that a fraud on the bankrupt act was intended. The assignee having filed a bill in equity to set aside, the creditor desired to surrender it and be allowed to prove his debt. *Held*, he lost his mortgage, but would not be allowed to prove. *Bingham v. Richmond et al.*, 6 N. B. R. 127; Fed. Cas. 1,415.

213. The trustees, under a trust deed to secure mortgage bonds, and the bondholders voluntarily surrendered possession of the trust property to the assignee in bankruptcy for the purpose of effecting a sale of the premises, without relinquishing their lien, the proceeds of sale to stand in lieu of the property. *Held*, that after an adverse decision as to the validity of the deed, it was

too late to surrender the bonds and ask admission to proof of debt. In *re Leland et al.*, 9 N. B. R. 209; 7 Ben. 156; Fed. Cas. 8,230.

## XVI. NOT PREFERENCES.

(a) *In General.*

214. The return of goods which have been ordered to fill a special order and damaged in transportation, and refused by parties for whom they were designed, is not a preference nor an act of bankruptcy. *Doan v. Compton et al.*, 2 N. B. R. 182; Fed. Cas. 3,940.

215. In accordance with the terms of a lease, a distress was levied within four months prior to bankruptcy, the bankrupt consenting to it. Collusion not shown. *Held*, that it was not fraudulent. *Goodwin et al. v. Sharkey et al.*, 15 N. B. R. 526.

216. A debtor delivered goods to the workmen of one of his creditors, upon the latter's credit, with the understanding that they would be paid for at the next pay day. The creditor applied the goods to the payment of a debt due from the debtor. *Held*, there was no preference. *Rice et al. v. Grafton Mills*, 18 N. B. R. 209.

217. Payment of attorney's fees for services previously and to be rendered does not constitute a preference. In *re Sidle*, 2 N. B. R. 77; Fed. Cas. 12,844.

218. A bankrupt was a member of a stock exchange board whose constitution provided that, in sales of seats of delinquent members, the proceeds should be applied to the benefit of the members of the board exclusive of outside creditors. His seat was sold and the proceeds paid to his creditors who were members of the board. Other creditors attacked the payment as a preference. *Held*, that it was not a preference, even though made within two months before bankruptcy. *Hyde, Ass., v. Woods et al.*, 15 N. B. R. 518; 94 U. S. 523.

219. Giving a creditor a note for his debt, secured by a third party as indorser, is not a fraud on the bankrupt act where the assets of the bankrupt are not lessened nor his debts increased thereby. *Dalrymple v. Hillenbrand*, 17 N. B. R. 434.

220. A bankrupt was indebted to a bank on a note for \$4,000, and had a deposit account



for \$4,500. Just before institution of proceedings in bankruptcy, knowing the insolvency of the bankrupt, one day prior to the maturity of the note, the bank took the maker's check for \$4,000 and delivered to him the note. *Held*, that such act was only the adjustment of mutual debts and not a fraudulent preference. *Robinson, Ass., v. Insurance Co. Bank*, 18 N. B. R. 243; 9 Biss. 117; Fed. Cas. 11,969.

221. A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights or credits to the prejudice of other creditors, is not contrary to the bankrupt act, but the assignee of the debtor is not bound by the settlement and may show that it is erroneous or fraudulent. *In re Comstock & Co.*, 12 N. B. R. 110; 3 Sawy. 320; Fed. Cas. 3,079.

222. P., becoming embarrassed, sold out his business to a firm, the notes of one member of which were paid to creditors in settlement of their claims, some of the creditors being omitted unknowingly by friends who managed the settlement. *Held* that, in the absence of knowledge of the omission, the preference was not fraudulent and could not be set aside. *Castle, Ass., v. Lee*, 11 N. B. R. 80; Fed. Cas. 2,506.

223. More than two months before commencement of involuntary bankruptcy proceedings, a bankrupt transferred part of his property in satisfaction of debts, being insolvent to the knowledge of his creditors. *Held*, that the transfers could not be impeached under Revised Statutes, section 5128 (1867). *Van Kleeck, Ass. etc., v. Miller et al.*, 10 N. B. R. 484; Fed. Cas. 16,860.

224. Where it is shown that a transfer was made in pursuance of an agreement entered into long before, and it is not shown that a preference is intended, the value of property transferred by a debtor within four months of bankruptcy proceedings cannot be recovered. *Wadsworth, Ass., v. Tyler*, 2 N. B. R. 101; 1 Chi. Leg. News, 189; Fed. Cas. 17,082.

225. A conveyance by an insolvent debtor to his creditor, of property upon which the creditor has a lien to a greater amount than the value thereof, is not void as being within the purview of the first clause of section 35

of the bankrupt act of 1867. *Catlin v. Hoffman*, 9 N. B. R. 342; 2 Sawy. 486; 21 Pittsb. Leg. J. 159; Fed. Cas. 2,521.

226. Where one creditor accepts a certain sum as a compromise, and is not led to believe that he is getting as much as others, and accepts the notes of his debtor's purchaser in part payment, he cannot be sustained in a petition against the debtor alleging a preference thereby under the bankrupt act of 1867. *In re Munger et al.*, 4 N. B. R. 90; Fed. Cas. 9,928.

227. Barring fraud in the transaction and an intent to defeat the act, there is nothing in the bankrupt law forbidding a loan of money to a man pecuniarily embarrassed, even though the lender had reason to believe the borrower insolvent. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 13 Wall. 375.

#### (b) *Because of Present Consideration.*

228. The right of an insolvent person, before proceedings are commenced against him, to pay a just debt, honestly to sell property for which a just equivalent is received, to borrow money and to give a valid security therefor, are all recognized by the bankrupt act. *Fox et al. v. Gardner*, 12 N. B. R. 187; 21 Wall. 475.

229. A creditor released the debtor's mortgage on certain property in exchange for goods within four months of his bankruptcy, knowing him to be in failing circumstances. *Held*, not to be a preference under section 5128 of the bankrupt act (1867). *Hallack et al. v. Tritch, Ass.*, 17 N. B. R. 293; 10 Chi. Leg. News, 219; Fed. Cas. 5,956.

230. Money loaned with security taken *in presenti* does not make the security taken a preference contrary to section 35 of the bankrupt act of 1867. *In re Morrison*, 10 N. B. R. 106; 6 Chi. Leg. News, 110; Fed. Cas. 9,839.

231. An insolvent debtor may sell or encumber his estate for a present and sufficient consideration, if the transaction be *bona fide*, and without fraud or intent to defeat the operation of the bankrupt act. *Gattman & Co. v. Honea, Ass.*, 12 N. B. R. 493; 7 Chi. Leg. News, 395; Fed. Cas. 5,271.

232. Where, in pursuance of the covenants of a lease, insurance is made upon a house-

and furniture, it does not constitute a preference. In *re Rosenfeld*, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; Fed. Cas. 12,057.

233. A transfer of property, made at or about the time of advances, and in payment therefor, will not subject the debtor to proceedings in involuntary bankruptcy; but if made some time before the advances, it is a preference which will subject him to such proceedings. In *re Pierson*, 10 N. B. R. 107; Fed. Cas. 11,153.

234. The preference at which the bankrupt act is aimed is not the collateral taken at the time the debt is contracted, but arises only in case of an antecedent debt. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 875.

235. The assignee filed a bill to set aside an alleged fraudulent preference made within four months prior to the bankruptcy proceedings. A bank held notes of the debtor, who wished an extension of one year, which was accorded only upon the tendering of further security. The debtor was not at the time believed to be insolvent, but became so shortly afterward. The bill was dismissed, and on appeal the judgment was affirmed. *Rankin, Ass. etc., v. Bank*, 14 N. B. R. 4; 8 Cent. Law J. 156; Fed. Cas. 11,503.

#### (c) *Bill of Sale.*

236. A. purchased logs with money furnished by B, under an agreement by which A. was to have about two-thirds and B. one-third, each to use as necessity required, keeping account of the number used. B., knowing A. to be insolvent, took a bill of sale of all the logs remaining, receiving not more than they were entitled to. *Held*, no preference. In *re Bousfield & Poole Mfg. Co.*, 16 N. B. R. 489; Fed. Cas. 1,703.

237. The execution of a bill of sale by a broker of a portion of his property to a customer, to avoid an action for an unlawful conversion of the proceeds of a sale, is not a fraudulent preference. In *re Jenkins, Ass., v. Mayer*, 3 N. B. R. 189; 2 Biss. 303; Fed. Cas. 7,272.

#### (d) *Change of Security.*

238. Giving a deed of trust upon property, to secure a debt previously secured by a mechanic's lien, is merely a change of se-

curities, and not a fraudulent preference given to the lien-holder. In *re Weaver*, 9 N. B. R. 132; Fed. Cas. 17,307. See *Cook v. Tullis*, 9 N. B. R. 433; 18 Wall. 332.

239. A mere change of securities, not made to secure an unsecured debt or to give a preference, is not void under the law, although made within four months before the petition was filed. *Stewart v. Platt*, 101 U. S. 731; *Clark v. Iselin*, 11 N. B. R. 337; 21 Wall. 360.

240. A bill of sale of personal property was given by a debtor, who afterwards became bankrupt, to his creditor more than four months before the filing of the petition. Afterward and within four months of the filing he executed a mortgage conveying the same property to the same creditor. *Held*, that the mortgage was not a preference, but a change in the form of the security. *Sawyer et al. v. Turpin et al.*, 14 N. B. R. 271; 91 U. S. 114; 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

#### (e) *Judgment.*

241. A creditor, within four months prior to bankruptcy proceedings, procured a judgment and levy against an insolvent debtor, the latter having and making no defense. *Held*, that such passive non-resistance gave no preference within the meaning of the bankrupt act. *Wilson v. Bank*, 9 N. B. R. 97; 17 Wall. 473; *Mason et al. v. Warthen et al.*, 14 N. B. R. 346; *Tenth Nat. Bank of N. Y. City et al. v. Warren et al., Ass.*, 17 N. B. R. 75; 96 U. S. 539.

242. A judgment note is valid when given more than four months before bankruptcy proceedings for a valuable consideration, even though judgment be entered and execution issued within four months thereof. *Sleek et al. v. Turner's Ass.*, 10 N. B. R. 580.

243. A lien was obtained by a creditor within four months preceding the commencement of bankruptcy proceedings, the creditor being at the time cognizant of the debtor's insolvency, and it appeared affirmatively that the bankrupt had given no assistance to the creditor in obtaining the lien. *Held*, the lien was valid. *Britton v. Payen et al.*, 9 N. B. R. 445; 7 Ben. 219; Fed. Cas. 1,906.

244. Upon writ of error to the court of common pleas, it was held that a state court

has jurisdiction to entertain an action by an assignee to recover money received as a preference, but that when an insolvent debtor consents to the revival of a judgment so as to continue a lien, such consent does not constitute a fraudulent preference. *Kemerer v. Tool*, 12 N. B. R. 384.

245. Allowing judgment to go by default amounts to suffering goods to be taken in execution, when taken under the judgment, and does not amount to procuring them to be so taken. *In re Craft*, 1 N. B. R. 89; 2 Ben. 214; Fed. Cas. 8,316.

246. Where an actual intent to give a preference is negatived, mere honest inaction on the part of an insolvent debtor, who is sued on a just debt, and allows judgment to go against him and his property to be levied on, is not an act of bankruptcy within the thirty-ninth section of the bankrupt act of 1867. *Wright v. Filley*, 4 N. B. R. 197; 1 Dill. 171; 5 West. Jur. 212; Fed. Cas. 18,077.

247. Under the thirty-fifth section of the bankrupt act of 1867, the mere entry of a judgment against an insolvent debtor under a warrant of attorney just prior to institution of proceedings in bankruptcy, the creditor knowing of the debtor's insolvency and the judgment being followed by execution, is not a preference which will be avoided. *Clark, Ass., v. Iselin*, 11 N. B. R. 337; 21 Wall. 360.

248. If a creditor realize his money under a judgment entered in an attachment suit without collusion, he may retain it, although the attachment was issued within four months before the commencement of proceedings in bankruptcy. *Henkelman et al. v. Smith, Ass.*, 12 N. B. R. 121.

249. A creditor believing his debtor insolvent brought suit and caused execution to be issued and levy to be made on his property. *Held*, that there was no preference, and that the creditor might have alleged this as an act of bankruptcy and demanded an adjudication. *Coxe v. Hale*, 8 N. B. R. 562; 10 Blatchf. 56; 21 Pittsb. Leg. J. 77; Fed. Cas. 8,310.

#### (f) *Mortgage.*

250. A mortgage executed on individual property for an individual debt in pursuance

of a parol contract that the mortgage should be given when requested by the creditor, although within four months of institution of proceedings in bankruptcy, is not a preference within the meaning of the bankrupt act of 1867. *Hewitt et al., Ass., v. Northup et al.*, 16 N. B. R. 27.

251. Prior to December, 1873, a bankrupt borrowed money from one knowing him to be bankrupt, and gave a mortgage therefor. *Held*, that the transaction did not constitute a fraudulent preference (1867). *In re Montgomery*, 12 N. B. R. 321; 2 Cent. Law J. 440; Fed. Cas. 9,732.

252. The members of a New York firm were members of firms in the same business in Canada. In each Canadian firm there was another partner. The Canadian firms mortgaged certain property to their creditors to secure payment of their debts. Certain creditors of the American firm claimed that the assets of all the firms should be distributed among the creditors of the New York firm. The transfers were *bona fide*. *Held*, that the transfers were not preferences so as to prevent the discharge of the bankrupts in the New York firm. *In re White et al.*, 13 N. B. R. 107; Fed. Cas. 17,533.

253. A mortgage is not a preference where the debt is secured by a prior mortgage covering goods subsequently acquired, if both mortgages cover the same goods. *Brett v. Carter*, 14 N. B. R. 301; 2 Lowell, 458; 2 N. Y. Wkly. Dig. 331; 23 Int. Rev. Rec. 152; 8 Cent. Law J. 286; 13 Alb. Law J. 361; 10 Amer. Law Rev. 600; Fed. Cas. 1,844.

253a. An agreement between A. and B. that in consideration that A. should furnish money to B. to buy skins, B. would tan and return them to A. for sale on commission, and that such skins in the process of tanning should be security for the moneys advanced, creates a charge upon the property in favor of A. in the nature of a mortgage which is good between the parties, and as to B.'s assignee in bankruptcy, without a change of possession, and is capable of enforcement. *Hanselt v. Harrison*, 105 U. S. 401.

#### (g) *No Reasonable Cause.*

254. A creditor having no reasonable cause to believe a debtor insolvent at the

time of receiving a security from him may hold it as against the assignee. *Rankin, Ass. etc., v. Bank*, 14 N. B. R. 4; 3 Cent. Law J. 156; Fed. Cas. 11,568.

255. A payment by a debtor, knowing himself to be insolvent, of one creditor in full of his demand, in the absence of proof that the debtor contemplated bankruptcy, or that the creditor had reason to believe that a fraud on the act was intended, is not a fraudulent preference. *In re Locke*, 2 N. B. R. 128; 1 Lowell, 298; Fed. Cas. 8,439.

256. A judgment obtained by one acting without knowledge of the condition of his debtor, or of any circumstance to create suspicion of insolvency, will not be interfered with. *Campbell v. Bank*, 8 N. B. R. 124; 2 Biss. 423; 2 Chi. Leg. News, 148; 1 Md. Law Rep. 169; Fed. Cas. 2,370.

257. A security will be valid, although given to a creditor by a mortgage out of the usual course of the debtor's business, if the creditor have no reasonable cause to infer insolvency, though in fact the debtor be insolvent at the time of giving the mortgage. *Lee, Ass. v. German Sav. Inst.*, 3 N. B. R. 53; 1 Chi. Leg. News, 370; Fed. Cas. 8,188.

258. A judgment confessed by warrant of attorney on notes executed simultaneously therewith, when the debtor was not insolvent and the creditor had not reasonable cause to believe him to be so, is not a fraudulent preference, and the judgment creditor is entitled to payment thereof out of the assets of the bankrupt's estate. *In re Wright*, 2 N. B. R. 155; Fed. Cas. 18,071.

259. A bankrupt, previous to his adjudication as such and at the time of contracting an indebtedness, executed a note therefor and a warrant of attorney to confess judgment thereon. *Held*, in the absence of proof that the bankrupt was aware of his insolvency, or that the creditor had reasonable cause to believe him so, it was not a fraudulent preference. *Armstrong v. Rickey Bros.*, 2 N. B. R. 150; 1 Chi. Leg. News, 145; 2 Amer. Law T. Rep. Bankr. 65; Fed. Cas. 546.

260. A sale on execution under a judgment by a creditor, within four months of the filing of a petition in bankruptcy, does not constitute a fraudulent preference if the

debtor be compromising his debts and the creditor have no reason to believe himself to be obtaining a preference. *Warren et al., Ass. v. Bank*, 5 N. B. R. 479; 5 Ben. 395; 42 How. Pr. 169; Fed. Cas. 17,200.

261. An assignee in bankruptcy sought to recover moneys and property alleged to have been conveyed by the insolvent within four months of bankruptcy to his creditors to create preferences, and to have certain confessed judgments for moneys to become due declared invalid. It appeared that the creditors had no just cause to believe the debtor insolvent. *Held*, the property and moneys not recoverable and the judgments valid. *Cook v. Waters et al.*, 9 N. B. R. 151.

262. The assignee of a principal cannot recover from a creditor for money paid him by a surety, even though the surety receives the money from the principal by a preference under the bankrupt act, if the creditor have no knowledge of that fact and receive the money in discharge of the obligation of the surety. *Tyler, Ass. etc., v. Brock et al.*, 17 N. B. R. 239.

#### (h) *Payment.*

263. Although proceedings in bankruptcy are pending against him, a debtor who is insolvent may pay any or all of his debts. *In re Oregon Pr. & Pub. Co.*, 18 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

264. Bonds and coupons of a railroad are not commercial paper within the meaning of the bankrupt act, and the payment of interest coupons after suit is brought or threatened on the same is not a preference of one creditor over the others. *In re Opelousa, Gr. W. R. R. Co.*, 3 N. B. R. 81; Fed. Cas. 10,547.

265. The district court granted a petition for an adjudication in bankruptcy filed against an insurance company, alleging a preference in the payment by the president, not the company, of the unearned premiums to the holders of policies which had terminated; but the circuit court held there was not sufficient evidence to justify the decision. *Knickerbocker Ins. Co. v. Comstock*, 9 N. B. R. 484; 6 Chi. Leg. News, 142; Fed. Cas. 7,879.

(i) *Advances.*

266. Advances made in good faith to an indebted person to enable him to carry on his business upon security taken at the time is not in violation of the bankrupt act. *Darby's Trustee v. Boatman's Sav. Inst.*, 4 N. B. R. 195; 1 Dill 141; 3 Chi. Leg. News, 249; 1 Leg. Op. 146; Fed. Cas. 3,571.

267. Shipments of cotton after insolvency to A. & Co., who made advances at the time to bankrupt, was not a preference. *Harrison v. McLaren*, 10 N. B. R. 244; Fed. Cas. 6,139.

**PRINCIPAL.**

See AGENT.

**PROCESS.**

See PLEADING AND PRACTICE, XV, (h).

**PROOF OF CLAIMS.**

- I. IN GENERAL.
- II. AMENDMENT OF.
- III. BEFORE WHOM MADE.
- IV. BY WHOM MADE.
- V. EFFECT OF.
- VI. EFFECT OF NOT MAKING.
- VII. MANNER OF MAKING.
- VIII. POSTPONEMENT OF.
- IX. RE-EXAMINATION OF.
- X. WHEN MADE.
- XI. WITHDRAWAL OF.

See EVIDENCE, X, (a); FRAUD, 101; INSURANCE, I; SECURED CLAIMS, IV; SET-OFF, 14.

**I. IN GENERAL.**

1. All claims against the estate of a bankrupt, however evidenced, must be proven. *Blum, Ex'r, v. Ellis*, 13 N. B. R. 345.

2. When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff at law. In re *Prescott*, 9 N. B. R. 385; 5 Biss. 523; 6 Chi. Leg. News, 151; Fed. Cas. 11,389.

3. The proceedings to prove a debt is part of the suit in bankruptcy, and the judgment

of the circuit court is final. *Wiswall et al. v. Campbell et al.*, Ass., 15 N. B. R. 421; 93 U. S. 347.

4. Joint creditors may be admitted to prove under separate commissions for the purpose of assenting to or dissenting from the discharge, but not to receive until after the separate creditors are paid in full. The exceptions are where the joint creditor is the petitioning creditor under a separate fiat, where there is no joint estate and no solvent partner, and where there are no separate debts. In re *Byrne*, 1 N. B. R. 122; 7 Amer. Law Reg. (N. S.) 499; 1 Amer. Law T. Rep. Bankr. 122; 15 Pittsb. Leg. J. 315; Fed. Cas. 2,270.

5. Where the trustee has proved the claim for a note against the estate of the payee in bankruptcy, and where the holder has not on the faith thereof changed his position in regard to the note, the trustee is not estopped from disputing the claim of the holder. In re *Dodge et al.*, 17 N. B. R. 504; 9 Ben. 480; Fed. Cas. 3,948.

6. A creditor filed his petition, under the provisions of section 39 of the act of 1867, to have the debtor declared a bankrupt. The debtor appeared by counsel and demanded a trial by jury. *Held*, that the creditor must establish his debt before proceeding to show acts of bankruptcy. *Brock v. Hoppock*, 2 N. B. R. 2; Fed. Cas. 1,912.

7. The moving party is entitled to open and close on the hearing of a motion to expunge a proof of claim. *Canby, Ass., v. Mo-Lear*, 13 N. B. R. 22; Fed. Cas. 2,378.

8. In proceedings against the estate of a deceased bankrupt, a creditor is competent to prove the contract on which his claim is based. In re *Merrill*, 16 N. B. R. 35; 9 Ben. 165; 24 Pittsb. Leg. J. 205; Fed. Cas. 9,466.

9. The court will not set aside an election of an assignee on account of any irregularity in admitting a claim, when its exclusion would not affect the result. In re *Jackson et al.*, 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

10. At the first meeting of creditors the bankrupt may object to the proof of debts. In re *Patterson*, 1 N. B. R. (8 vo. ed.) 101; 1 Ben. 448; Bankr. Reg. Supp. 22; Fed. Cas. 10,814.

11. A judgment debt offered for proof against the debtor's estate in bankruptcy, the

debtor having filed his petition after the date of the judgment, may be objected to by other creditors for fraud or irregularity, as they are not privies to the judgment and may impeach it collaterally. In *re Fowler*, 1 N. B. R. (8 vo. ed.) 677.

12. Where creditors seek to prove debts based on the debtor's promissory notes, and judgment has been obtained on one of them, the notes should be produced if required by the register. If the debt were proved on the judgment, it is not necessary to produce the note. In *re Knoepfel*, 1 N. B. R. (8 vo. ed.) 70; 1 Ben. 398; Fed. Cas. 7,892.

13. A bill in equity is defective in statement that alleges a claim to be illegal or invalid, and to have been fraudulently proved, in general terms, without specifying wherein the illegality or fraud consists. *First Nat. Bank of Troy v. Cooper et al.*, 9 N. B. R. 529; 20 Wall. 171.

13a. An administrator of an estate used the funds for the purposes of a firm of which he was a member, an account being kept on the books of the firm to the credit of the estate. *Held*, that a joint and several claim was thereby created against the joint and several estates, and that it could be proved against the firm estate and the individual estate of the administrator. In *re Jordan & Blake*, 19 N. B. R. 465.

13b. A claimant, who had for several years held a chattel mortgage executed by the bankrupts, took possession under the mortgage upon learning of their insolvency, and within four months of bankruptcy proceedings sold the property and purchased at the sale. The assignee brought suit against him and recovered judgment, the claimant being found guilty of actual fraud in obtaining a preference. The judgment was paid and the claimant proved his claim in full. *Held*, he could prove for a moiety only. In *re Haufman & Houck*, 19 N. B. R. 283; Fed. Cas. 7,627.

13c. A party who purchased an imported article, duty free, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured. In *re Kirkland, Chase & Co.*, 14 N. B. R. 157.

13d. In an action brought by the bankrupt, the defendant interposed a counter-claim. The bankrupt having been adjudicated before

the trial of the action, the defendant offered no evidence, and judgment was rendered against him. *Held*, that he was not thereby precluded from proving his claim in the bankruptcy proceedings. In *re People's Safe Deposit and Savings Institution of the State of New York*, 18 N. B. R. 498; Fed. Cas. 10,971.

## II. AMENDMENT OF.

14. A bankrupt court may allow proofs of debt to be amended, and in cases of mistake or ignorance, whether of fact or law, will generally exercise that power in the absence of fraud and when all parties can be placed *in statu quo*, if the error had not occurred, and where justice seems to demand that it should be done. In *re Parkes*, 10 N. B. R. 88; Fed. Cas. 10,754.

15. Where the name of a creditor is stated in the petition asserting a claim by a proper averment but omitting the amount, the claim may be amended by adding the amount, if done in good faith. In *re Blair et al.*, 17 N. B. R. 492; 10 Chi. Leg. News, 278; 25 Pittsb. Leg. J. 123, 149; Fed. Cas. 1,481.

16. A creditor, after examination by the solicitor for the assignee on his own claim, moved, upon his own evidence and upon an affidavit, for leave to amend his proof of claim. *Held* that, the proof being defective, the creditor had a right to amend it. In *re Montgomery*, 8 N. B. R. 108 (1st case); Fed. Cas. 9,729.

17. The court may allow supplemental affidavits or proofs to be filed if the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are not sufficient. In *re Hanibel et al.*, 15 N. B. R. 233; 9 Chi. Leg. News, 165; 15 Alb. Law J. 271; 24 Pittsb. Leg. J. 152; Fed. Cas. 6,023.

18. A creditor had security for his debt, but proved his demand in ignorance of his privilege, and omitted mention of the security. *Held* that, in the absence of fraud, he could amend the proof. In *re McConnell*, 9 N. B. R. 387; 10 Phila. 287; 81 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

## III. BEFORE WHOM MADE.

19. A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and cred-

itor both reside in the same judicial district. In re Sheppard, 1 N. B. R. 115; 7 Amer. Law Reg. (N. S.) 484; 1 Amer. Law T. Rep. Bankr. 49; Fed. Cas. 12,753.

20. Claims due resident creditors must be proved before a register of the home district. Those due non-resident creditors must be proved before any register or commissioner of the court in any other district than that in which the bankruptcy proceedings are pending. Commissioners of United States circuit courts may not take proof of claims due creditors residing in the district where the proceedings are pending (act of 1867). In re Healy, 2 N. B. R. 36.

21. Proof of debts in bankruptcy may be taken by a register or a commissioner of a resident or non-resident creditor, or whether the commissioner hold his office in the same town or in the same building in which a register holds his office, the only limitation being that it shall be taken before a register or commissioner of the judicial district in which the creditor resides, or in which the proceedings are pending. In re Merrick, 7 N. B. R. 459; Fed. Cas. 9,463.

22. Proof of debt against a bankrupt taken before a notary public is not authorized by law; such proof may be taken *only* before such officers as are enumerated in section 22 of the act of 1867. In re Strauss, 2 N. B. R. 18; Fed. Cas. 13,532.

23. Although bankruptcy proceedings have been stayed, having been superseded by arrangement under section 43 of the bankrupt act of 1867, the sole power to admit claims against the bankrupt's estate is not vested in the trustees under the arrangement, but they may and should be proved before the register. In re Bakewell, 4 N. B. R. 199; 18 Pittsb. Leg. J. 289; 3 Pittsb. Rep. 323; Fed. Cas. 788.

24. Where the proof of a debt is taken before the attorney of the creditor, it is inadmissible. In re Nebe, 11 N. B. R. 289; Fed. Cas. 10,073.

#### IV. BY WHOM MADE.

See CLAIMS, 137, 273; COMMERCIAL PAPER, 13.

25. Only the holder and owner of a claim can make proof. In re Ford et al., 18 N. B. R. 426; Fed. Cas. 4,932.

26. Debts proved before the election of an

assignee, and sold and assigned after proof, must be voted upon by the owner, and not by the original creditor, the owner being entitled to one vote. In re M. Frank, 5 N. B. R. 194; 5 Ben. 164; Fed. Cas. 5,050.

27. Proof of debt may be made by an agent who has had exclusive charge of the same, and knows personally all the facts required to be sworn to in proving it, the creditor himself having no personal knowledge thereof. In re Watrous et al., 14 N. B. R. 258; 8 N. Y. Wkly. Dig. 180; Fed. Cas. 17,270.

28. Mere absence from the state, or the locality where the proof is made, is not alone regarded as cause for proof by an agent. In re Jackson et al., 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

29. The absence of a claimant, which will render a proof of debt by an agent admissible, must be "from the United States;" nor will his agent's oath, that he is better acquainted with the facts than his principal, render the agent's deposition alone admissible as proof of debts. In re Whyte, 9 N. B. R. 267; Fed. Cas. 17,606.

#### V. EFFECT OF.

30. Rights of creditors accrue after admitted proof of claim, and such creditors then have the right to ask for an amendment of the petition for any defect therein. In re Jones, 2 N. B. R. 20; Fed. Cas. 7,447.

31. Where proof of a claim is given in the form required by statute, a *prima facie* case is made, subject only to an order for further proof and the right of a creditor, or person interested, to offer counter-proof. In re Saunders, 13 N. B. R. 164; 2 Lowell, 444; Fed. Cas. 12,371.

32. A refusal by the assignee, or his neglect, to recover property conveyed by the bankrupt in fraud of his creditors, entitles any creditor who has proved his debt to institute proceedings for that purpose. Free-lander & Gerson v. Holloman et al., 9 N. B. R. 331; Fed. Cas. 5,081.

33. By proving debts in bankruptcy, creditors waive all right of action against the bankrupt, either upon a judgment or the original indebtedness. In re Meyers, 1 N. B. R. (8 vo. ed.) 581; 2 Ben. 424; Fed. Cas. 9,518.

34. Bankrupts created a debt by fraud. A creditor having proved his claim and taken

a dividend instituted suit for balance and procured a warrant of arrest. On motion for stay of proceedings and to set aside warrant of arrest, *held*, that as the debt was created by fraud, the creditor did not waive his right to sue for the balance by proving his claim and taking a dividend. In *re Clews et al.*, 19 N. B. R. 109; Fed. Cas. 2,891.

35. A firm creditor, by proving his debt in bankruptcy proceedings against a single partner, does not lose his right as a creditor against the firm or its assets. *Hudgins v. Lane et al.*, 11 N. B. R. 462; 2 *Hughes*, 361; Fed. Cas. 6,827.

36. A. and B. each filed a petition in involuntary bankruptcy against C. While the proceedings were pending C. himself filed a petition and was adjudged a bankrupt. A. and B. proved their claims under the voluntary petition. *Held*, that they thereby waived their right to continue the involuntary proceedings. In *re Nounnan & Co.*, 6 N. B. R. 579.

37. A conditional vendor's claim for the conversion of the property is not lost by proving his debt. *Johnson v. Worden*, 13 N. B. R. 335.

38. If a creditor prove his debt against a bankrupt, the only effect, under section 21 of the act of 1867, is that he cannot afterwards maintain a suit against the bankrupt on the debt, and proceedings pending thereon against the bankrupt, and unsatisfied judgments already obtained thereon against him, are discharged. In *re Levy*, 1 N. B. R. 66; 2 *Ben.* 169; 1 *Amer. Law T. Rep. Bankr.* 122; Fed. Cas. 8,297.

39. A judgment was ordered for the defendant on the ground that the plaintiff, having proved his debt in bankruptcy, was precluded from maintaining a subsequent action to enforce the same. The proceedings in bankruptcy were terminated before the bringing of the action, without the discharge of the defendant. Upon appeal, a new trial was granted. *Miller v. O'Kain*, 14 N. B. R. 145.

40. Proving a debt in bankruptcy does not of itself operate as an absolute extinguishment or satisfaction of the debt, the creditor being remitted to his former rights and remedies, if the bankrupt is refused his discharge. *Dingee v. Becker*, 9 N. B. R. 508; Fed. Cas. 8,919.

41. It is no ground of defense or suspension of an action, on a joint or joint and several promissory note, against a surety, that the note has been proved as a claim against the principal in a court of bankruptcy. *Gregg v. Wilson*, 15 N. B. R. 142.

42. In an action in a state court the defendant pleaded in bar that he had been adjudged bankrupt since the institution of the suit, that the plaintiff had proved his debt in bankruptcy, and that the proceedings in bankruptcy were still pending. *Held*, that the plea was insufficient. *Brandon Mfg. Co. v. Frazer & Co.*, 18 N. B. R. 362.

43. A creditor of a bankrupt brought an action on a promissory note. The defendant pleaded that it had been adjudicated bankrupt and that the plaintiffs had proved the claim in suit in the bankruptcy proceedings and received a dividend, and were prevented from recovering in a subsequent action. *Held*, that the plaintiffs might recover the balance of their claim. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 N. B. R. 385; 91 U. S. 656.

44. An indorser is not released from his liability even if the holder has proved his debt in bankruptcy against the maker for the full amount as an unsecured claim; but the holder by so proving releases his claim as well at law as in equity to a mortgage given for the purpose of indemnifying the indorser. *Merchants' Nat. Bank of Syracuse v. Comstock*, 11 N. B. R. 235.

## VI. EFFECT OF NOT MAKING.

45. If a mortgagee does not prove his debt he may enforce his mortgage in a state court, although the assignee set the property apart as an exemption to the bankrupt mortgagor. *Hatcher v. Jones*, 14 N. B. R. 387.

46. Where a fiduciary creditor fails to come into court and prove his debt, etc., he is not bound by the discharge, but may recover from the bankrupt by showing that it was within one of the exceptions in the act of 1841. *Chapman v. Forsyth*, 2 *How.* 202.

47. Creditors inhibited from proving their debts will be excluded from voting for an assignee. In *re Stevens*, 4 N. B. R. 122; 4 *Ben.* 513; Fed. Cas. 18,391.

48. Creditors acquire no right to proceed



in an action against a bankrupt, pending determination of the question of discharge, from the fact that they have not proved their claims in bankruptcy. In re Schwartz, 15 N. B. R. 330; 14 Blatchf. 196; 52 How. Pr. 513; 15 Alb. Law J. 350; Fed. Cas. 12,502.

49. Without proof of the debt in bankruptcy no lien can be enforced, nor can dividends be received on account of it. In re Jordan, 9 N. B. R. 416; Fed. Cas. 7,529.

## VII. MANNER OF MAKING.

50. A debt is to be considered as proved when it is duly authenticated and sent to the assignee or to the register. Ex parte Harris et al., In re Cochrane, Jr., 16 N. B. R. 432; 2 Lowell, 563; Fed. Cas. 6,109.

51. For the holder of the paper of a bankrupt to be able to prove his claim, he must show that he paid value, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper. In re Howard, Cole & Co., 6 N. B. R. 372; Fed. Cas. 6,751.

52. As a very general rule, the register should demand the same degree of proof, before admitting a creditor to vote for assignee, as is requisite in a trial at law or a hearing in equity. Exceptional cases, if free from all suspicion, might authorize deviation. In re Northern Iron Co., 14 N. B. R. 356; Fed. Cas. 10,322.

53. A creditor is not bound, upon a mere objection to his claim, to produce such evidence thereof as would be necessary at an ordinary trial. In re Saunders, 13 N. B. R. 164; 2 Lowell, 444; Fed. Cas. 12,371.

54. The citation throws upon the creditor the burden of supporting his claim by further proof than that already filed. In re Lount, 11 N. B. R. 315; 7 Chi. Leg. News, 155; Fed. Cas. 8,543.

55. A receiver of property of a creditor of the bankrupt is an assignee of the debt due such creditor and as such may prove it. But if assigned before proof, the proof must be supported by the deposition required in General Order 34 under the act of 1867. The deposition may in the first instance be *ex parte*, as in Form No. 22. In re Mills, 17 N. B. R. 472; Fed. Cas. 9,612.

56. Where the consideration for which a note presented for proof is set forth in a creditor's deposition as goods, wares, merchandise, etc., the kind of goods, the quantity, the price, the date of the transaction and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period, should be stated. In re Elder, 3 N. B. R. 165; 1 Sawy. 73; 17 Pittsb. Leg. J. 178; 3 Amer. Law T. 140; 2 Chi. Leg. News, 241; 1 Amer. Law T. Rep. Bankr. 198; Fed. Cas. 4,326.

57. In a proof of debt the creditor should set forth at least one full Christian name of the affiant and of the bankrupt, in addition to the surname. In re Valentine, 12 N. B. R. 389; 4 Biss. 317; 1 N. Y. Wkly Dig. 101; Fed. Cas. 16,812.

58. A deposition in support of a proof of claim in involuntary bankruptcy must show whether the claim is secured or unsecured. Cunningham v. Cady, 13 N. B. R. 525; 8 Chi. Leg. News, 165; 4 Amer. Law Rec. 510; Fed. Cas. 3,480.

59. Proof of debt in a foreign country must be taken in accordance with section 5079, Revised Statutes. In re Lynch & Emberson, 16 N. B. R. 38; 24 Pittsb. Leg. J. 205; Fed. Cas. 8,635.

60. Where papers, annexed to an answer to a petition to expunge proof of a claim, are sought to be used as evidence, they must be proved in the usual manner. Canby, Ass., v. McLearn, 13 N. B. R. 22; Fed. Cas. 2,378.

61. A creditor who, after making a deposition to prove his debt, retains possession of the deposition and does not allow it to pass into the hands of the assignee, is not one who has proven his debt. In re Sheppard, 1 N. B. R. 115; 7 Amer. Law Reg. (N. S.) 484; Fed. Cas. 12,753.

## VIII. POSTPONEMENT OF.

62. The proof of a claim may be postponed until after the choice of an assignee. In re Smith, 1 N. B. R. 25; 2 Ben. 118; Fed. Cas. 12,971.

63. At the first meeting of creditors the register postponed the allowance of certain claims until after the election of an assignee. The certificate and opinion of the register were approved by the district court, and such

decision was affirmed on petition for review by the circuit court. *In re Northern Iron Co.*, 14 N. B. R. 356; Fed. Cas. 10,322.

64. To justify postponement of a claim until after the election of an assignee, it is not necessary that the register shall be satisfied the claim is invalid, or that the creditor has no right to prove it. If he have a substantial doubt he should postpone the claim. The doubt should be reasonable and substantial. There must be proper investigation. The register cannot postpone on mere objections. When the power of postponement is erroneously exercised the matter may be certified to the court. Mere relationship to the bankrupt will not justify postponement. *In re Jackson et al.*, 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

65. At a first meeting of creditors were five creditors related to the bankrupts. Other creditors, therefore, asked that these claims be inquired into. The register thereupon postponed proof of these claims, and, there being no choice of assignee, appointed one. Afterward, objection was made to such postponement, and to the reception of the proof of another claim by the agent of the creditor, himself absent in another state. The appointment of the assignee was confirmed by the court. *Id.*

66. When a creditor objects to the postponement of his claim, he should have the objection entered and the question certified before any further action transpires before the register. *Id.*

67. A register may postpone the proof of a claim where there are doubts as to its validity, in view of the receipt of a preference contrary to the provisions of the bankrupt act of 1867. *In re Stevens*, 4 N. B. R. 122; 4 Ben. 513; Fed. Cas. 13,391.

68. Where creditor has accepted a preference, having knowledge of the debtor's insolvency, the proof of his claim should be postponed until after the election of the assignee. *In re Chamberlain and Chamberlain*, 3 N. B. R. (8 vo. ed.) 710; Fed. Cas. 2,574.

69. One creditor had received a preference, and the claims of the others had been purchased with money belonging to the bankrupt and in collusion with him. *Held*, that the register had a right to postpone proof of their claims until after election of

the assignee, and to reject their votes. *In re Herrman & Herrman*, 3 N. B. R. 153; Fed. Cas. 6,426.

70. The proof of a claim, postponed at the first meeting of creditors until the election of an assignee, is to be treated in all respects as if it had not been before tendered and postponed. *Id.*

71. A claim founded upon a large open account between the parties, and being in dispute between them, is of a doubtful character, and the rights of the creditor are postponed until an assignee is appointed. *In re Jones*, 2 N. B. R. 20; Fed. Cas. 7,447.

72. When it appears at the first meeting of creditors that the names of certain creditors by whom claims against the estate are presented do not appear upon the schedule, the proof of such claims should be postponed until after the election of an assignee. *In re Milwain*, 12 N. B. R. 358; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 9,623.

73. Where the officers of a bankrupt corporation present large claims, the register should postpone the proof thereof until after the election of the assignee. *In re Lake Superior Ship Canal, Railroad and Iron Co.*, 7 N. B. R. 376; Fed. Cas. 7,997.

74. If the debts be objected to, the register cannot admit them to proof and allow a vote for assignee, as that would be the decision of a question which he has no power to decide. *In re Hunt*, 17 N. B. R. 205; 35 Leg. Int. 71; Fed. Cas. 6,884.

## IX. RE-EXAMINATION OF.

75. When an assignee files a petition for a re-examination of a proof, the creditor need only offer himself for examination, and the assignee must introduce such opposing proof as he may have. *In re Robinson*, 14 N. B. R. 130; 8 Ben. 406; Fed. Cas. 11,938.

76. Creditors seeking a re-examination of claims are in no position to ask it, unless a petition for re-examination has been filed in compliance with General Order No. 34 issued under the act of 1867. *In re Tift*, 17 N. B. R. 502; Fed. Cas. 14,029.

77. The proof of a debt offered by a creditor was rejected by the district court, on objection by the assignee. *Held*, that the creditor should sue the assignee and thus

establish his claim. *Adams v. Meyers*, 8 N. B. R. 214; 1 *Sawy.* 306; *Fed. Cas.* 62.

78. A claim against an estate, allowed by the register before the appointment of an assignee or of the trustees, can, on notice to the respective claimants, be opened and passed upon anew. Where the trustees are satisfied a demand is correct they can allow it. They can dispose of assets and settle the estate without special orders; keep their own accounts and records; have the aid of the register or judge when needed, and have their actions closed by formal decree. In *re Darby*, 4 N. B. R. 98; 4 N. B. R. 61; 18 *Pittsb. Leg. J.* 154; *Fed. Cas.* 8,570.

#### X. WHEN MADE.

79. A creditor who proves his claim after the time for the hearing of an application for discharge cannot be heard in opposition to the application, nor can his debt be counted among the claims proved so as to affect the discharge. In *re Borst*, 11 N. B. R. 96; *Fed. Cas.* 1,666.

80. A voluntary bankrupt applied for a discharge; no debts had been proved and no creditors appeared. Subsequently M. & Co. proved for \$1,512.85, on which debt all assets, \$95, were paid. *Held*, that a creditor, in order to contest a bankrupt's discharge, must prove his debt on or before the day appointed to show cause, or else appear on that day and object. In *re Read*, 19 N. B. R. 231; 11 *Chi. Leg. News*, 288; 4 *Cin. Law Bul.* 394; *Fed. Cas.* 11,600.

#### XI. WITHDRAWAL OF.

81. Where a proof of debt may be withdrawn without affecting the rights of intervening creditors injuriously, and all parties may be restored to their former position, the court may permit the withdrawal. In *re Hubbard*, 1 N. B. R. (8 vo. ed.) 679; 1 *Lowell*, 190; *Fed. Cas.* 6,813.

82. A creditor may withdraw the instrument, but not the proof of a debt, in bankruptcy proceedings. In *re Emison*, 2 N. B. R. 179; 1 *Chi. Leg. News*, 342; *Fed. Cas.* 4,459.

83. The register cannot order or permit the withdrawal of a proof of debt after he has passed upon the same, and allowed, certified and transmitted the proof to the as-

signee. In *re McIntosh*, 2 N. B. R. 158; *Fed. Cas.* 8,826.

84. Neither proof of debt nor deposition can be withdrawn, the bankrupt objecting, merely because the deposition does not state that promissory notes not yet due are held, upon payment of which the claim is to be discharged. The creditor may be required to amend. In *re Lawrence*, 1 N. B. R. (8 vo. ed.) 74; 1 *Ben.* 406; 6 *Int. Rev. Rec.* 115; *Fed. Cas.* 8,577.

#### PROXY.

See ATTORNEY, 2.

#### PUBLICATION.

See NOTICES, IX.

#### PURCHASER.

See SALES.

#### QUALIFICATIONS.

See JUDGE.

#### RAILROAD.

See CORPORATIONS.

#### RATIFICATION.

1. One can only ratify a previous act when he is capable at the time of ratification of then performing the act ratified. *Cook et al. v. Tullis*, 9 N. B. R. 433; 18 *Wall.* 832.

2. A ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third persons have intervened between the act and the ratification. *Id.*

3. The doctrine of ratification (*omnis ratihabitio retrotrahitur*, etc.) is of no force when its application would prejudice the rights of strangers. In *re Kansas City Stone & Marble Mfg. Co.*, 9 N. B. R. 76; *Fed. Cas.* 7,610.

4. The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy. *Sparhawk et al. v. Drexel et al.*, 12 N. B. R. 450; 1 Wkly. Notes Cas. 560; Fed. Cas. 13,204.

5. Subsequent ratification of the action of a board of trustees in filing petition by stockholders does not cure the defect of a want of jurisdiction in the register at the commencement of the proceedings. *In re Lady Bryan Mining Co.*, 4 N. B. R. 181; 2 Abb. 527; 1 Sawy. 349; Fed. Cas. 7,978.

### REASONABLE CAUSE.

See *INSOLVENCY*, IV; *PREFERENCES*, IV, (b), VI, XVI, (g).

### RECEIVER.

#### I. APPOINTMENT.

#### II. DUTIES AND RIGHTS.

#### III. IN GENERAL.

See *CONFLICT OF LAWS*, 13; *DISCHARGE*, 132; *INJUNCTION*, 12, 22; *PREFERENCE*, 117, 118; *TRUSTEES*, 61.

#### I. APPOINTMENT.

See *COURTS*, 247.

1. Where a receiver has been appointed by the state court to take possession of the property of a corporation, the United States court will not appoint a receiver, as the jurisdiction is concurrent. *Blake v. Ala. & Chat. R. Co.*, 6 N. B. R. 331; Fed. Cas. 1,493.

2. A and B, partners, were sued individually on certain firm notes by C., but, B. having become a non-resident, C. caused an attachment to issue against him. A. owed B., but, having been declared a bankrupt, C. garnished assignee in bankruptcy. *Held*, that court had no jurisdiction, but that a receiver of B.'s effects should be appointed, who, representing B. in the bankruptcy distribution, would receive from A.'s assignee all moneys coming to B., and then account to the state court for them. *Jackson v. Miller et al.*, 9 N. B. R. 143.

3. A petition was filed in the United States circuit court for the southern district of Alabama, praying that a receiver be appointed for railroad property. *Held* that, as the United States circuit court for the southern district of Mississippi and the chancery courts of Alabama, Georgia and Tennessee had acquired jurisdiction, and as their powers were just as large, and as they were competent to administer full relief, court would not interfere. *Alabama & Chatt. R. R. Co. v. Jones*, 7 N. B. R. 145; Fed. Cas. 127.

4. A United States district court in bankruptcy will not interfere with possession of receivers appointed by state court to take charge of railroad until title is impeached for cause impeachable under bankrupt act. *Alden v. Boston, H. & E. R. R. Co.*, 5 N. B. R. 230; Fed. Cas. 152.

5. A bill was filed by certain stockholders praying an injunction to prevent contemplated fraudulent acts, and a receiver, which latter was appointed. Thereafter a petition in bankruptcy was filed, and, an assignee being appointed, a motion was made to discharge the receiver and to transfer the property to the assignee. The motion was denied. *Myer et al. v. Crystal Lake P. & P. Works*, 14 N. B. R. 9.

6. Where the court takes possession of property and places the same in the hands of receivers, the rights of the parties are not thereby affected, as the receiver holds for the legal owner and the action of the court is merely suspensive. *Miller v. Bowles et al.*, *Appleton v. Stevers, Ass.*, 10 N. B. R. 515.

7. The appointment of a receiver by a state court to take possession of the assets of a person, firm or corporation, and apply the same to the payment of debts, is a "taking on legal process," within the meaning of the act of 1867. *In re Mer. Ins. Co.*, 6 N. B. R. 43; 3 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

8. To entitle a mortgagee to have a receiver appointed, it must appear that the mortgaged premises are inadequate security for the debt, and that the mortgagor or other person liable for the debt is insolvent. The inadequacy must be clearly made out. *Burlingame, Ass. etc., v. Parce et al.*, 17 N. B. R. 246.

## K. DUTIES AND RIGHTS.

See CORPORATIONS, V; EVIDENCE, 99.

9. Receivers of a corporation, declared insolvent under state laws, claimed the right to administer the assets as against the bankruptcy courts. *Held*, the United States bankruptcy courts could take as against them. In re Ind. Ins. Co., 6 N. B. R. 260; Holmes, 103; Fed. Cas. 7,017.

10. Action to foreclose a mortgage. A receiver of the rents of the real estate was appointed after the mortgagor filed his petition, but before adjudication. Sale of premises did not yield sufficient to pay the mortgage, and the mortgagee moved that the rents be paid to him in reduction of the deficiency, but the assignee claimed the money. *Held*, that the mortgagee was entitled to the rents. *Hayes v. Dickinson*, 15 N. B. R. 350.

11. When a receiver goes into a court of law he must stand on the legal estate. If he applies for leave to use the name of the person having the legal right of action, the court will indemnify the latter by compelling security against the costs. *Lansing v. Manton*, 14 N. B. R. 127; 3 N. Y. Wkly. Dig. 112; Fed. Cas. 8,079.

12. A receiver may be appointed after an adjudication and before the selection of assignee for the temporary care of the estate, when special circumstances render it desirable. *Id.*

13. A receiver cannot maintain an action to recover the value of property sold by the bankrupt, in fraud of the bankrupt act, prior to the commencement of the proceedings, and the assignee will not, on motion, be admitted to prosecute the suit. *Id.*

14. Property of a bankrupt was not in the receiver's hands, when a subsequent incumbent, who had been already impleaded by a prior one in the original action, filed, without leave of court, a subsequent original bill to foreclose. *Held*, latter bill not sustained where relief sought is competent in the pending litigation. *Sutherland et al. v. Lake Sup. S. C., R. & I. Co.*, 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

15. Receiver appointed by courts of one state may generally sue in the courts of another state. *Chandler, Receiver, et al. v. Sid-*

*dle*, 10 N. B. R. 236; 3 Dill 477; 1 Cent. Law J. 341; Fed. Cas. 2,594.

16. An execution creditor claimed a lien on money in the hands of the marshal by virtue of proceedings supplementary to execution commenced prior to bankruptcy, but which before appointment of receiver were restrained by the bankrupt court. *Held*, that the claim must be disallowed; that until the appointment of a receiver his right is not a lien within the bankrupt law. In re Wheeler et al., 18 N. B. R. 385; 26 Pittsb. Leg. J. 84; Fed. Cas. 17,490.

17. A receiver of property of a creditor of the bankrupt is an assignee of the debt, and as such assignee may prove it. But as it was assigned before proof, the proof must be supported by the deposition required in General Order No. 34 (act of 1867). The deposition may be *ex parte*, as in Form No. 22. In re Mills, 17 N. B. R. 472; Fed. Cas. 9,612.

## III. IN GENERAL

18. A corporation had been placed in the hands of a receiver by the state court. A petition in bankruptcy having been filed, the rule to show cause was served on the cashier, who had turned the keys over to the receiver. *Held*, sufficient service. *Platt v. Archer*, 6 N. B. R. 465; 9 Blatchf. 559; Fed. Cas. 11,213.

19. The same person cannot be at the same time receiver under the state law and a trustee or assignee appointed by the bankrupt court. In re Stuyvesant Bank, 6 N. B. R. 272; 5 Ben. 566; Fed. Cas. 13,581.

20. Receivers of a company "dissolved" under state insolvency laws have no power to withhold the assets of the bankrupt company from the jurisdiction of the courts of bankruptcy. In re Independent Ins. Co., 6 N. B. R. 260; Holmes, 103; Fed. Cas. 7,017.

## RECORD.

See EVIDENCE, 79, 84, V; MORTGAGE, 15, 54, XI, (e); PLEADING AND PRACTICE, 72.

1. Evidence in proceedings to release a debtor on *habeas corpus* cannot be received to contradict the declaration and show that the alleged cause of action does not exist.

In re Deave, 2 N. B. R. 11; 1 Lowell, 251; Fed. Cas. 3,843.

2. An assignment by register to assignee does not require to be proved, but must be recorded upon the certificate of the clerk and tender of fees. In re Neale, 3 N. B. R. 43; Fed. Cas. 10,066.

3. Recording is only necessary to give validity against creditors under state laws, and the bankruptcy act recognizes and respects such validity if prior to bankruptcy proceedings. In re Wynne, 4 N. B. R. 5; Chase, 227; Fed. Cas. 18,117.

4. A mortgage executed in a state having no statute on the subject of record, or if record is not required between the parties, will not be defeated by the provision in section 14 of the bankruptcy act as to recording (1867). In re Dow, 6 N. B. R. 10; Fed. Cas. 4,036.

5. Assignment to assignee takes effect by relation to commencement of proceedings and recording is not essential to title. Davis v. Anderson et al., 6 N. B. R. 145; Fed. Cas. 3,623.

6. Every court has power to alter and amend its records so as to conform to the truth, and a revisory court is bound to assume that the evidence upon which the correction was made was legal and sufficient. Alabama & Chatt. R. R. Co. v. Jones, 7 N. B. R. 145; Fed. Cas. 127.

7. A deed of trust, valid between parties and against purchasers with actual notice, without being recorded, cannot be avoided because not recorded within four months of commencement of bankruptcy proceedings. *Aliter*, if recording is a condition precedent to validity. Seaver v. Spink, 8 N. B. R. 218.

## REDEMPTION.

See JUDGMENTS, VII.

## REFEREE (REGISTER).

### I. POWERS.

(a) *In General*.

(b) *Claims*.

### II. DUTIES.

### III. FEES AND COSTS.

## IV. RELATION TO ASSIGNEE AND TRUSTEE.

(a) *In General*.

(b) *Fees and Costs*.

(c) *Accounts*.

## V. IN GENERAL.

See EXAMINATION OF BANKRUPT, 32, 45;  
PROOF OF CLAIMS, 64.

## I. POWERS.

(a) *In General*.

See CERTIFICATION; DISCHARGE, 58; EVIDENCE, VII; SALES, 119.

1. A petition in bankruptcy was filed against a debtor and referred to a register, who adjudicated the defendant a bankrupt. Defendant had made default. *Held*, that the register had authority to make the order. In re De Ford, 18 N. B. R. 454; Fed. Cas. 3,744.

2. A warrant was issued, returnable on the 15th of September, but because of yellow fever the register was prevented from attending. He made orders of adjournment and forwarded them to his assistant, he being absent. *Held*, that the register had no authority to so adjourn a meeting and a new warrant must issue. In re Dickinson, 18 N. B. R. 514; 26 Pittsb. Leg. J. 143; Fed. Cas. 3,895.

3. The holder of a judgment against the bankrupt, which judgment was a lien against his real estate, objected to examination before the register as to the consideration of the judgment. *Held*, that the register had power to make an order requiring witness to appear and be examined, and that such examination might extend to the consideration of the judgment. In re Pioneer Paper Co., 7 N. B. R. 250; Fed. Cas. 11,178.

4. A register can issue an order for the examination of a bankrupt whose petition has been referred to him. The application need state no reasons therefor, and is not required to be verified by affidavit. In re Lanier, 3 N. B. R. 59; Fed. Cas. 8,070.

5. On certificate of register, *held*, that register has no power, on mere application of creditors, to issue summons for examination of a trustee appointed under the bankrupt act, or for production by him of books and

vouchers pertaining to trust. In re Hickset al., 19 N. B. R. 449; Fed. Cas. 6,457.

6. It was the intention of congress to vest the register with all the powers of the district court in relation to all matters about which there is no contest. In re Gettleston, 1 N. B. R. 170; Fed. Cas. 5,373.

7. The opposing interest which precludes the register from appointing an assignee is not merely an interest contending by vote, but an interest in opposition to the power of appointment by him. In re Jackson et al., 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

8. The bankrupt was a party to the submission of a controversy to the register. Held, that he was bound by the decision in a collateral action. Johnson v. Worden, 13 N. B. R. 335.

9. A register of the court may be appointed by the court a special custodian of property to be sold under a mortgage, to handle the details of the sale and give a deed to the purchaser. In re Hanna, 5 N. B. R. 292; 4 Ben. 469; 4 N. B. R. 139; Fed. Cas. 6,026.

10. A schedule of property set aside for the bankrupt under the exemption laws was prepared by the register. Held, that it was the duty of the assignee to set aside the property to be exempted without interference of the register. In re Peabody, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

11. A register has power to allow a bankrupt to amend his schedule on his *ex parte* application and no creditor has a right to oppose such application. In re Watts, 2 N. B. R. 145; 3 Ben. 166; 2 Amer. Law T. Rep. Bankr. 74; Fed. Cas. 17,298.

12. The bankrupt sought to amend his schedule by adding twenty other debts. The court held that there had been culpable laxity, and refused to allow the amendment except upon such terms as should prevent injustice to creditors. In re Morgenthal, 1 N. B. R. 98; 28 Leg. Int. 92; 6 Phila. 468; Fed. Cas. 9,813.

13. An order to show cause why proof of a debt against the estate of a bankrupt should not be vacated must be made by the court and not by the register. Comstock v. Wheeler, 2 N. B. R. 171; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 3,084.

14. A creditor cannot change his vote on the ground of his mistake in voting, after the meeting of creditors has adjourned, and thereby give the register power to appoint the assignee; but such creditor may explain his mistake, or make any other objection to the choice of the assignee to the court before which the subject of the approval of the assignee will be determined. In re Scheiffer et al., 2 N. B. R. 179; 1 Chi. Leg. News, 261; Fed. Cas. 12,445.

15. The oath of allegiance annexed to the petition of the debtor may be taken before a register. In re Walker, 1 N. B. R. 67; Fed. Cas. 17,062.

16. A register ordered a bankrupt to turn over to the custodian of the estate certain moneys in his hands. He failed to do this. Held guilty of contempt and committed to jail until it should be paid. In re Speyer, 6 N. B. R. 255; 42 How. Pr. 397; Fed. Cas. 13,230.

17. Register issued a warrant to the marshal to give notice of a meeting of creditors for choice of an assignee, and also called a meeting of creditors to consider a composition to be proposed by bankrupts, fixing the same date for both meetings. The notices of the first meeting were withheld by order of solicitors. The register adjourned the meeting and directed that new notice be given. He further stated that he desired both meetings held at the same time, and he would adjourn the composition meeting to the day fixed for the choice of an assignee. Held, that the register has power to adjourn a meeting of creditors when, in his judgment, the interest of the whole body of creditors requires it. In re Chemey et al., 19 N. B. R. 16; Fed. Cas. 2,637.

18. Registers with the exercise of legal discretion have control over proceedings pending before them, including the power to grant or refuse adjournments and postponements. In re Hyman, 2 N. B. R. 107; 3 Ben. 28; 36 How. Pr. 282; Fed. Cas. 6,984.

19. The register must have power, in composition proceedings, to conduct the inquiries and to take down the answers and to adjourn the meeting by consent of parties, and even against the wishes of one or the other; but not to conduct a written examination as to all the investigations which would

be proper in bankruptcy; and in most cases he would be justified in refusing to permit the inquiries to extend beyond the day of meeting. In re Proby, 17 N. B. R. 175; 12 Amer. Law Rev. 598; Fed. Cas. 11,439.

20. Where a petition in bankruptcy is filed on behalf of a corporation without proper authority, the register acquires jurisdiction to adjudge the corporation a bankrupt; and a ratification by the stockholders, after adjudication, does not cure the defect. In re "Lady Bryan Min. Co.," 4 N. B. R. 181; 2 Abb. (U. S.) 527; 1 Sawy. 349; Fed. Cas. 7,978.

### (b) *Claims.*

21. The word "judge," mentioned in section 28 of the act of 1867, providing that, "when a claim is presented for proof before the election of an assignee, and the judge entertain doubt of its validity or of the right of the creditor to prove it, and is of opinion that such validity ought to be investigated by the assignee, he may postpone the proof until the assignee is chosen," is construed to mean or include register. In re Bininger & Clark, 9 N. B. R. 568; Fed. Cas. 1,421.

22. The register has no power either to admit or postpone a contested claim which he considers valid, but must report it to the court if the vote upon it could affect the choice of assignee. In re Bartusch, 9 N. B. R. 478; Fed. Cas. 1,086.

23. A register in bankruptcy has no power to expunge *prima facie* proofs of debt or to reject claims, nor has he the authority to refuse the votes of the claimants, nor to exclude them from a dividend. In re Jaycox v. Green, 7 N. B. R. 803; 7 West. Jur. 18; Fed. Cas. 7,240.

24. A register has power to pass upon the validity of the proof of claims except when an issue of law or fact is raised. In re Bogert et al., 2 N. B. R. 139; 38 How. Pr. 111; 1 Chi. Leg. News, 211; Fed. Cas. 1,598.

25. The register who presides at a composition meeting may pass upon a claim disputed on its merits, but such action is subject to review by the court. Unlike the case of a meeting of creditors to elect an assignee, his power here is not limited to postponement of the claim. In re Keller et al., 18 N. B. R. 331; Fed. Cas. 7,634.

26. If the debts are objected to, the register cannot admit them to proof and allow a vote for assignee, because that would be the decision of a question which the statute gives him no power to decide. In re Hunt, 17 N. B. R. 205; 35 Leg. Int. 71; Fed. Cas. 6,884.

27. A register made a report on a certain claim without recommending that it be allowed or disallowed. *Held*, he might amend it in court. In re Campbell, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,348.

28. If a register determine the amount due on a claim without hearing the claimant or appointing a time for hearing, his determination is not conclusive, although the claimant and the assignee agreed that he should adjust it. Moran et al. v. Bogert, 14 N. B. R. 393.

## II. DUTIES.

See COMPOSITION, 93; TRUSTEE, 133.

29. The register is an officer of the court and will take judicial notice of its judgments and decrees. In re Scott et al., 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

30. An intended bankrupt had surrendered his property to the register, when, under involuntary proceedings and his subsequent adjudication, the marshal demanded of the register the surrender of the property to him under section 42, and upon his refusal, *held*, that the register deliver to the marshal (act of 1867). In re Howes et al., 9 N. B. R. 423; 7 Ben. 102; Fed. Cas. 6,787.

31. The register's duty in countersigning checks is judicial and not ministerial in its character. In re Clark, 9 N. B. R. 67; Fed. Cas. 2,810.

32. A register to whom depositions for proof of debt have been transmitted by another register is not bound to receive and file the same, if they do not appear to be in conformity with the law. In re Loder, 3 N. B. R. 162; 4 Ben. 125; Fed. Cas. 8,456.

33. It is the duty of the register to exercise discretion in regard to the direction to be given to estates in bankruptcy, that all insurable property shall be insured and cared for in every respect. In re Carow, 4 N. B. R. 178; 41 How. Pr. 112; Fed. Cas. 2,426.

34. Where a question is made as to the number and amount of the creditors who



have joined in a petition, reference should be made to a register to examine and report upon the proofs. In re Sargent, 13 N. B. R. 144; 1 N. Y. Wkly. Dig. 485; Fed. Cas. 12,861.

35. It is error for a register not to return lists of claims counted and of those rejected. In re Lloyd, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429.

36. The granting of the discharge of the bankrupt does not oust the register of his jurisdiction. The discharge of the bankrupt is a mere incident in the proceedings. The marshaling and distribution of the estate is the subject-matter before the court. The cause proceeds before the register until the final discharge of the assignee from the trust. In re Dole, 7 N. B. R. 538; 7 West. Jur. 629; Fed. Cas. 3,965.

37. During an examination before a register in bankruptcy a witness refused to answer certain questions. The register certified the facts to the court, expressing the opinion that the witness should answer the questions. *Held*, that the register should have declared his opinion at the hearing. Upon exception taken, his duty is to certify it for the summary consideration of the court, the examination proceeding in its other parts. If the witness refuses to answer his contumacy should be reported. In re Reakirt, 7 N. B. R. 329; Fed. Cas. 11,614.

### III. FEES AND COSTS.

See COSTS, ETC., II, (e).

38. The register may require that his lawful fees be paid before proceeding in an examination of a debtor and may charge \$1 for his certificate. In re Tift, 17 N. B. R. 550; Fed. Cas. 14,030.

39. The register taxed the items of fees charged by him against the bankrupt for the services rendered by the register. The register and the counsel for the bankrupt having been heard by the court as to the items objected to, the court passed upon them *seriatim*. In re Robinson, 1 N. B. R. 49; 2 Ben. 145; 1 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,937.

40. A question as to charges of a register may be raised by an exception, or may, at

the request of a party, be certified by the register. In re Sherwood, 1 N. B. R. 74; 25 Leg. Int. 76; 1 Amer. Law T. Rep. Bankr. 47; 6 Phila. 461; Fed. Cas. 12,774.

41. Unless his fee is first tendered to him, a register is not bound to countersign a check. In re Breck et al., 13 N. B. R. 216; Fed. Cas. 1,823.

42. For his fees a register has a lien on the fund in court which has been awarded to a party. *Id*.

43. The marshal presented to the clerk for taxation a statement of his fees. The assignee had notice and consented that the bill be taxed at a specified amount, and the clerk taxed it at that amount. The register refused to countersign the assignee's check for the amount on the ground that he would have to audit the accounts and that some of the items should not be allowed. *Held*, that the marshal was entitled to have his bill taxed without awaiting the assignee's final account, and the register should countersign a check therefor. In re Rein, 13 N. B. R. 551; 8 Ben. 384; Fed. Cas. 11,678.

44. The register, upon order of the court, made a taxation of the costs of all the officers of the court, including the assignee. The bankrupt having filed exceptions to the taxation, the items were passed upon *seriatim* by the court. In re Dean, 1 N. B. R. 26; 1 Amer. Law T. Rep. Bankr. 9; Fed. Cas. 3,699.

### IV. RELATION TO ASSIGNEE AND TRUSTEE.

#### (a) *In General.*

45. A register ordered the assignee to furnish information as to the funds in his hands. He refused to give it. *Held*, that the register had the power to order it. In re Clark & Bininger, 6 N. B. R. 194; Fed. Cas. 2,807.

46. It was moved to show cause why the case in bankruptcy should not be removed from the register, and in support thereof it was shown that he had attempted to influence the choice of an assignee. Upon order of the court the case was so removed. In re Smith, 1 N. B. R. 25; 2 Ben. 118; Fed. Cas. 12,971.

47. It is the duty of an assignee to give a certificate containing the names and ad-

dressers of creditors who have proven their claims, and upon his failure to do so the register can compel him so to do. In re Blaisdell, 6 N. B. R. 78; 5 Ben. 420; 42 How. Pr. 274; Fed. Cas. 1,488.

(b) *Fees and Costs.*

See COMPOSITION, 3.

48. The attorney for a bankrupt applied to a register for an order directing the payment of certain fees and expenses incurred in the proceedings out of funds in the hands of the assignee, who was present and made no objection. *Held*, that the register could make the order. In re Lane, 2 N. B. R. 100; 8 Ben. 98; 1 Chi. Leg. News, 123; Fed. Cas. 8,042.

49. A register refused to act on the petition of an attorney against the assignee to compel payment of his fees, expenses and disbursements. *Held*, that the register had authority to act and would be directed to do so. In re Stafford, 13 N. B. R. 378; Fed. Cas. 13,274.

50. Assignees received \$6,000, and the charges for legal services were \$2,000 and for the assignees \$1,200. The account was not acted upon by the register. No creditor objected. *Held*, that it was the duty of the register to regulate charges whether creditors object or not. In re Sawyer, 16 N. B. R. 460; 2 Lowell, 551; 15 Alb. Law J. 280; Fed. Cas. 12,396.

(c) *Accounts.*

51. Where the accounts of the assignee are filed at the second meeting without prior notice to the creditors, the register is justified in deferring the audit until the next meeting. In re Clark et al., 6 N. B. R. 204; Fed. Cas. 2,809.

52. A register certified up to the court the question whether he could audit and pass accounts presented at a second meeting. *Held*, he could. *Id.*

53. The register should see that the assignee gives creditors notice touching the auditing, settlement and adjournment of the assignee's accounts, and of distribution under them; the failure of the assignee to do so may affect right to a discharge. In re Bushey, 3 N. B. R. 167; 27 Leg. Int. 111; Fed. Cas. 2,227.

V. IN GENERAL.

54. It is a contempt of court to make a wanton attack upon the character of a register in a paper filed before the judge. In re Breck et al., 13 N. B. R. 216; Fed. Cas. 1,823.

55. A motion was made for an order confirming a proposed composition, but opposing creditors offered affidavits to show errors in the register's reports of the meetings, in that he omitted to record objections and other proceedings, and he misstated what took place. *Held*, that the register's report must be taken to be a true report of the proceedings and the dissatisfied creditors must move to have it referred back for correction. In re Spencer, 18 N. B. R. 199; Fed. Cas. 13,222.

56. A register has no power to order a bankrupt to execute deeds. Anon., 3 N. B. R. 58.

REGISTER.

See REFEREE.

REHEARING.

See APPEALS AND WRITS OF ERROR; COURTS; NEW TRIALS; PLEADING AND PRACTICE; REVIEW.

A court should not do indirectly what it cannot do directly; hence when an appeal has been dismissed in the circuit court for being too late, the party cannot apply for a rehearing in the district court in order that upon the re-entering of the decree an appeal may be perfected. In re Troy Woolen Co., 6 N. B. R. 16; 5 Ben. 418; Fed. Cas. 14,200.

RELATIVE OF BANKRUPT.

See FRAUD, VI; TRUSTEE, 93.

An objection to the assignee appointed, for the reason that he is related to the bankrupt, is well taken. In re Powell, 2 N. B. R. 17; Fed. Cas. 11,354.

RENT.

I. LIABILITY OF TRUSTEE.

II. COVENANTS.

III. DISTRESS.

## IV. CLAIM FOR

(a) *In General*(b) *Lien*

## V. IN GENERAL

See INJUNCTION, 84; MORTGAGES, 65, 97, 99;  
SALE, 31.

## I. LIABILITY OF TRUSTEE.

See ESTATES, 83, II, (f).

1. A. leased certain premises to B, who before the termination of the lease became bankrupt. The assignee did not accept the lease but occupied, and paid for the premises independently. *Held*, that the assignee, not having elected to accept the lease, was not liable for the rent accruing after adjudication. In re Ten Eyck et al., 7 N. B. R. 26; Fed. Cas. 13,829.

2. An assignee carried on the business of a bankrupt in a mill, when he was called upon to pay rent for certain premises which the bankrupt had leased in connection with said mill business. *Held*, that being ignorant of said lease, and it not being essential to the mill business, and the assignee never having recognized it in any way, he was not liable to its covenants. In re Washburn, 11 N. B. R. 66; Fed. Cas. 17,211.

3. The owner of a lot which had been occupied by the bankrupts petitioned the court for an order that the assignee pay the rent of the lot during the time that certain property of the estate remained on a portion of the lot. *Held*, that the assignee was bound to pay a reasonable compensation for the portion of the lot used, but that he was not bound by the covenants of the lease. In re Ives et al., 18 N. B. R. 28; Fed. Cas. 7,116.

4. To entitle a landlord to rent from an assignee in bankruptcy for premises leased to the bankrupt, an actual occupation by the assignee must appear, and it must be beneficial to the estate. *Id.*

5. If an assignee continues to occupy the premises leased by the bankrupt, he is liable personally for the rent, and the landlord has a lien on the goods upon the premises. The expenses of the estate cannot be allowed before the payment of rent that accrued after the commencement of the proceedings in

bankruptcy, and while the assignee occupied the premises. Buckner v. Jewell & Norton, 14 N. B. R. 286.

6. When a petition is filed to obtain payment for rent that accrued while the assignee occupied the premises, a jury trial may be allowed. *Id.*

7. Until an assignee in bankruptcy elects to accept a lease as assignee, he does not become liable for rent accruing after the adjudication in bankruptcy. In re Ten Eyck et al., 7 N. B. R. 26; Fed. Cas. 13,829.

8. A bankrupt leased premises for a year under a verbal agreement. Previous to the termination of the lease he became bankrupt and an assignee was appointed. The assignee was held responsible for the rent from the time of taking possession of the premises until the disposal of the stock, though not subsequent to that. In re Merrifield, 3 N. B. R. 25; Fed. Cas. 9,465.

9. An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a lease on behalf of the estate, as he finds most beneficial, and can take a reasonable time for decision. Where the rent is large, a speedy decision would be demanded. In re Laurie et al., 4 N. B. R. 7.

10. If an assignee in bankruptcy elects to accept a lease held by the bankrupt he is required to pay rent from the date of the petition. *Id.*

11. If the officers of the court keep possession of the premises of a bankrupt, the landlord is entitled to a reasonable compensation for the time they are so occupied. In re Hamburger et al., 13 N. B. R. 277; 1 N. Y. Wkly. Dig. 53; Fed. Cas. 5,975.

12. The filing of a bill for the sale of property free from incumbrances does not have the effect of giving the mortgagee a right to the rents thereafter collected. The assignee in bankruptcy is entitled to the rents of the property until the mortgagee claims them. The filing of a petition and notice thereof to the assignee is sufficient to entitle the mortgagee to rents thereafter accruing. In re Bennett, 12 N. B. R. 257; 2 Hughes, 156; Fed. Cas. 1,313.

13. The rent due for the leased premises which are occupied by the assignee (or trustee) in settling the bankrupt's business is a preferred claim. In re Butler, 6 N. B. R.

501; 19 Pittsb. Leg. J. 146; 3 Pittsb. Rep. 369; Fed. Cas. 2,286.

14. A bankrupt held a lease. Upon adjudication the assignee took possession until the stock was sold. The landlord claimed credit for the unexpired portion of the lease. *Held*, that his right against the bankrupt expired on the day of the adjudication; that the assignee was liable for the time during which he occupied the premises; but where the occupation of the assignee was for the benefit of the estate, he will be credited with amount which he was obliged to pay. In re Webb & Co., 6 N. B. R. 302; Fed. Cas. 17,315.

15. The prevention of injury to the premises by not removing machinery is not a circumstance to be considered in determining the compensation to the landlord for the use of the premises by the assignee. In re Breck et al., 12 N. B. R. 215; 8 Ben. 93; Fed. Cas. 1,822.

## II. COVENANTS.

16. The firm A. B. leased certain premises. A. retired from the firm; C. was admitted and the lease was transferred to the new firm. On the bankruptcy of the new firm, *held*, that if A. was compelled to pay the lessor under his covenants in the lease, he might prove the amount in bankruptcy against B. C. Ex parte Lake et al., In re Whiting et al., 16 N. B. R. 497; 2 Lowell, 544; Fed. Cas. 7,991.

17. A lessee under a lease which provides that, after a breach, the lessee shall remain liable for rent precisely as before, excepting for such sums as are received for the use of the premises, cannot prove a claim for his liability under such lease in bankruptcy proceedings against a bankrupt to whom he had assigned the lease. *Id.*

18. An assignee should pay from the assets the rent of a store occupied by him from the filing of the petition to the date of surrendering possession. But rent and damages for non-performance of covenants in a lease, accruing after the commencement of proceedings in bankruptcy, are not debts provable against the estate. In re Hufnagel, 12 N. B. R. 554; Fed. Cas. 6,837.

19. A landlord petitioned to have his rent paid in full out of the proceeds of property of the bankrupt, on which he claimed a lien

by the terms of his lease, which he alleged operated as a mortgage. *Held*, that he had no lien, the lease not having been recorded as required by the statutes of Michigan. In re Dyke et al., 9 N. B. R. 430; Fed. Cas. 4,227.

## III. DISTRESS.

See CLAIMS, VIII, (e).

20. Until the levy of a distress warrant, the landlord has no lien on the general property of the tenant in the county, under the statutes of Illinois. Morgan v. Campbell, Ass., 11 N. B. R. 529; 22 Wall. 381.

21. When the local law requires that a landlord, in making a distress for rent, shall file with a justice of the peace, or clerk of the court, a copy of the distress warrant and an inventory of the property levied upon, the amount due to be assessed by such officer, and recorded and certified to the officer making the seizure, the landlord's lien is not perfected so as to give priority over general creditors, until such assessment, record and certification. In re Joslyn, 3 N. B. R. 118; 2 Biss. 235; 2 Chi. Leg. News, 187; Fed. Cas. 7,550.

22. A distress for rent founded upon a written obligation of the tenant to the landlord, promising to deliver a certain quantity of produce in payment of rent of land, and for property purchased of the landlord, cannot be maintained. Brook v. Terrill, 2 N. B. R. 190; 1 Chi. Leg. News, 349; Fed. Cas. 1,914.

## IV. CLAIM FOR.

### (a) *In General.*

See CLAIMS, VIII, (e), 129; DISCHARGE, 264.

23. A claim for rent falling due after bankruptcy proceedings and after the surrender of the premises by the assignee cannot be allowed as a debt against the bankrupt's estate. Bailey, Ass., v. Loeb & Bro., 11 N. B. R. 271; 2 Woods, 578; 2 Cent. Law J. 42; Fed. Cas. 739.

24. Without an order of the court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class, the assignee cannot pay a claim for the use and occupation of premises. In re Hoagland, 18 N. B. R. 530; Fed. Cas. 6,545.

25. A marshal held some of the property seized by him, on the premises which the bankrupt had leased. The landlord claimed rent for the use of the premises. *Held*, that the allowance to the landlord was to be measured by the benefit received by the estate, not by the covenants of the lease, and that the measure was the value of the premises for storage. In *re Wheeler et al.*, 18 N. B. R. 385; Pittsb. Leg. J. 84; Fed. Cas. 17,490.

26. Possession of the store containing the bankrupt's goods was retained until after the sale. The landlord petitioned for the payment of rent until the date of the surrender of possession. The petition was granted. In *re Walton et al.*, 1 N. B. R. 154; Fed. Cas. 17,181.

27. The proceedings in bankruptcy give no authority to the assignee to use a man's property without his consent, or without compensation, as rent, for the benefit of the estate. *Id.*

28. Goods of a bankrupt had been left in the store rented by him some months before the assignee took possession. The assignee immediately removed them. *Held*, that the owner of the store could claim what was a reasonable price for storage, but not the value of the store as a salesroom. In *re The Lucius Hart M. Co.*, 17 N. B. R. 459; Fed. Cas. 8,593.

29. A landlord of premises rented by a bankrupt, the premises being occupied by a marshal, should apply to the court to have the premises vacated if he wishes to re-rent, and should not make application for allowance for rent. In *re McGrath et al.*, 5 N. B. R. 254; 5 Ben. 188; Fed. Cas. 8,808.

30. The lessors, under a lease executed prior to the filing of the lessee's petition in bankruptcy, claimed rent accruing after such filing, to which the assignee objected. *Held* that, under section 19 of the act of 1867, no rent can be claimed after the filing of the petition. In *re May et al.*, 9 N. B. R. 419; 7 Ben. 238; Fed. Cas. 9,325.

31. If a note taken for rent is not paid at maturity, the landlord is entitled to all his remedies for the collection of his claim, in the same manner as if the note had never been given. In *re Bowne et al.*, 12 N. B. R. 529; 1 N. Y. Wkly. Dig. 100; Fed. Cas. 1,741.

32. Although the claim of a landlord is

not strictly a lien, as it does not attach to any specific article of property, yet under the laws of Mississippi it is entitled to priority of payment out of the estate. *Austin v. O'Reilly, Ass. etc.*, 12 N. B. R. 329; 2 Woods, 670; 2 Cent. Law J. 455; 1 N. Y. Wkly. Dig. 36; Fed. Cas. 665.

33. If a tenant make an assignment for the benefit of creditors to a trustee who sells the goods on the premises after the commencement of the proceedings in bankruptcy, and turns the proceeds over to the assignee, the landlord is entitled to payment of the rent out of the proceeds. In *re Bowne et al.*, 12 N. B. R. 529; 1 N. Y. Wkly. Dig. 100; Fed. Cas. 1,741.

### (b) *Lien.*

See CLAIMS, 97; ESTATES, II, (f).

34. Under the statute of Anne a landlord has a secured lien for his rent in the state of South Carolina, and that law is still in force, not having been repealed by the military order of General Sickles. In *re Trim, Wagner et al. v. Wagner*, 5 N. B. R. 23; 2 Hughes, 355; Fed. Cas. 14,174.

35. If the landlord has no lien on the bankrupt tenant's goods as against the bankrupt on the day the petition in bankruptcy is filed, he has none subsequently as against the assignee. In *re Butler*, 6 N. B. R. 501; 19 Pittsb. Leg. J. 146; 8 Pittsb. Rep. 369; Fed. Cas. 2,236.

36. The marshal sold goods on which the bankrupt's landlord had a lien for rent. The landlord applied to have his claim allowed as preferred. *Held*, that it was clearly preferred. In *re Hoagland*, 18 N. B. R. 530; Fed. Cas. 6,545.

37. A lessor who neglects to take steps to secure his lien for rent on the goods of his tenant before proceedings in bankruptcy is not entitled to have the rent paid as a preference out of the funds received by the assignee from a sale of the goods. *Austin v. O'Rielly*, 8 N. B. R. 129; Fed. Cas. 664.

38. A judgment was obtained before the beginning of proceedings in bankruptcy, and execution was levied after the defendant was adjudged bankrupt. The levy was on personal property located on leased premises, and the debtor's landlord notified the sheriff that he

claimed the rent due him out of the proceeds of the sale. *Held*, that the landlord was entitled to his lien for rent. *Barnes' Appeal*, 13 N. B. R. 548; 91 U. S. 521.

39. The assignee in bankruptcy acquires his title to movable property found upon the premises, subject to the rights of all other persons; and where rent is a lien upon the personal property of the bankrupt, it must be paid first out of the proceeds of the sale. *Longstreth v. Pennock et al*, 13 N. B. R. 95; 20 Wall. 575.

### V. IN GENERAL.

40. A company, being insolvent, paid in full its rent, in order to prevent the forfeiture of a valuable lease. *Held*, the act was a technical act of bankruptcy. In *re Merchants' Ins. Co.*, 6 N. B. R. 48; 3 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 78; Fed. Cas. 9,441.

41. Where two premises are let jointly to A. and B., and A. agrees with B. to divide the premises, each to pay a proportionate part of the rent, A. can retain exclusive possession of the part so set apart to him only so long as he complies with the condition, *i. e.*, the payment of his part of the rent; and while his failure so to do will deprive him as against B. of the exclusive possession of his part, it will not authorize B. to entirely exclude him therefrom. In *re Hotchkiss*, 9 N. B. R. 488; 7 Ben. 235; Fed. Cas. 6,715.

42. A debt due from a bankrupt under an agreement made on the surrender of a lease, that he would pay any deficiency arising on a reletting by the landlord, will be considered as contracted at the time of such agreement, and not at the time a judgment was obtained therefor. In *re Swift*, 7 N. B. R. 591; 6 Ben. 324; Fed. Cas. 13,693.

43. A sale of land free from incumbrances does not pass to the purchaser the bankrupt's right to any portion of the growing crops thereon, stipulated to be paid him by way of rent. In *re Bledsoe*, 12 N. B. R. 402; 1 N. Y. Wkly. Dig. 101; Fed. Cas. 1,538.

44. A bankrupt tenant's liability for rent ceases on the day of adjudication, and where the assignee occupies the premises after that time he is himself responsible; but if the occupation is for the benefit of the estate he

will be allowed credit for the amount so paid. In *re Webb & Co.*, 6 N. B. R. 302; Fed. Cas. 17,815.

### REPEAL.

See STATUTORY CONSTRUCTION, VII.

### REPLEVIN.

See EXEMPTIONS, 87.

1. A state court may entertain an action against an assignee for the tortious taking of property not in possession of the bankrupt and belonging to a stranger. *Leighton v. Harwood*, 12 N. B. R. 360.

2. The rule that, where a party has come lawfully into possession of property, trover or replevin will not lie till after demand and refusal, does not apply where, before suit, defendant has disposed of goods. *Linder, Ass., v. Lewis et al.*, 19 N. B. R. 455.

### RES ADJUDICATA.

1. An existing adjudication in bankruptcy precludes all inquiry touching the existence or validity of the debt of a petitioning creditor. In *re Fallon*, 2 N. B. R. 92; 1 Chi. Leg. News, 107; Fed. Cas. 4,628.

2. In opposition to a discharge in bankruptcy a creditor set up the fraudulent transfer by the bankrupt of certain of his property in violation of the bankrupt act, but on trial the allegations were held not proved as a matter of fact. On petition to restrain the assignee from suing the transferee of such property, *held*, that the assignee was not bound by the former decision of the court. In *re Penn et al.*, 8 N. B. R. 98; 5 Ben. 500; Fed. Cas. 10,928.

3. A creditor, a bank, objected to the discharge of a bankrupt on the ground that he had made a fraudulent conveyance to his wife. It appeared that the cashier of the bank had recovered judgment in his own name upon the bank's claim against the debtor, and that he filed a creditor's bill against the bankrupt and his wife asking that the conveyance be set aside. The bill was dismissed after a hearing and the supreme court affirmed the decree. *Held*, that

the matter was *res adjudicata*, and that the creditor was estopped to oppose the discharge. In *re Antisdel*, 18 N. B. R. 289; Fed. Cas. 490.

4. The finding of a state court that a debt was one created by the defalcation of the bankrupt while acting in a fiduciary capacity is conclusive on the bankrupt court. In *re Whitney*, 18 N. B. R. 563; Fed. Cas. 17,581.

## RESIDENCE.

See PLACE OF BUSINESS.

## REVIEW.

### I. CIRCUIT COURT.

(a) *Jurisdiction to.*

(b) *Power to.*

### II. PETITION FOR.

### III. PRACTICE ON.

See APPEALS AND WRITS OF ERROR; COSTS; NEW TRIALS; REHEARING.

### I. CIRCUIT COURTS.

(a) *Jurisdiction to.*

1. The revisory jurisdiction of the circuit court extends to all decisions of the district court or district judge at chambers which cannot be reviewed upon appeal or writ of error. In *re Alexander*, 3 N. B. R. 6; Chase, 295; 16 Pittsb. Leg. J. 91; Fed. Cas. 160.

2. The jurisdiction of the circuit court to review summary proceedings in bankruptcy is not limited by any measure of the value of the property involved. *Samson v. Blake et al.*, 6 N. B. R. 410.

(b) *Power to.*

3. Powers of circuit court in bankruptcy cases are revisory only, and a petition to review does not transfer to it the whole proceedings. In *re Clark et al.*, 3 N. B. R. 122; Fed. Cas. 2,804.

4. The mode of review by petition, bill, etc., under section 2 of the act of 1867, is expressly confined to cases in which no special provision is otherwise made, and does

not apply to cases in which an appeal lies. In *re Place et al.*, 4 N. B. R. 178; 8 Blatchf. 302; 3 Chi. Leg. News, 218; Fed. Cas. 11,200.

5. The application for review given by the first paragraph of the twentieth section of the bankrupt act of 1867 extends to those cases in which the district court by section 1 is given jurisdiction to issue summary orders, and to proceedings of that court in the ordinary proceedings in bankruptcy, or upon petition therein, whose special aid is sought in any matter embraced in that jurisdiction. In *re Casey*, 8 N. B. R. 71; 10 Blatchf. 376; Fed. Cas. 2,495.

## II. PETITION FOR.

6. A petition for review should set forth in what the error in the decision of the district court consists and the nature of the error. *Littlefield v. Delaware & Hudson Canal Co.*, 4 N. B. R. 77; 3 Cliff. 371; Fed. Cas. 8,400.

7. A petition to review an adjudication was filed by commissioners appointed under a state law to wind up a bank. *Held*, that petition must be dismissed at cost of commissioners and judgment of adjudication affirmed. *Thornhill et al. v. Bank of Louisiana*, 5 N. B. R. 367; 1 Woods, 1; Fed. Cas. 13,992.

8. Failure to assign a specific error in petition for review may be cured by amendment, and no delay should happen to creditors for defect in mere formal proceedings. *Lamson v. Blake*, 6 N. B. R. 410.

## III. PRACTICE.

See PLEADING AND PRACTICE, X, (c).

9. When the revisory jurisdiction of the circuit court over the district court is on a question of fact, the burden of proof is on the petitioner to show error in the decision, and he must also show that the evidence will not support the finding. In *re Dow*, 6 N. B. R. 10; Fed. Cas. 4,036.

10. Where the petition for review is demurred to, the demurrer admits the truth of its statements, and if these are sufficient the demurrer is overruled and the decree below reversed. *Curran v. Munger*, 6 N. B. R. 83; Fed. Cas. 3,487.

11. The finding of fact in the district court is not conclusive upon the circuit court, but is open to review; it should, however, not be lightly regarded, nor overruled except upon a very decided conviction that it was erroneous. In re Cornwall, 6 N. B. R. 805; 6 Amer. Law Rev. 365; Fed. Cas. 3,250.

12. The review of summary proceedings is given to the circuit court as a court of equity, and the court on appeal is not bound to reverse if satisfied that the facts are correctly found and that no injustice has been done. Samson v. Blake, 6 N. B. R. 410.

13. When a motion for a nonsuit is denied, the court's action is not reviewable in error. Miller, Ass., v. Jones, 15 N. B. R. 150; Fed. Cas. 9,576.

### REVISED STATUTES.

See CONFLICT OF LAWS, 23; STATUTORY CONSTRUCTION, 72.

### REVIVAL OF DEBTS.

See DISCHARGE, XIX; LIMITATIONS, STATUTE OF, 21, IV.

### RULES.

See DISCHARGE, 32.

1. The district courts have no power to make general rules in bankruptcy. In re Kennedy and Mackintosh, 7 N. B. R. 337; Fed. Cas. 7,699.

2. The general rules and orders made by the supreme court were not designed to create or declare, nor do they create and declare, the rights of creditors in the estate of the bankrupt; still less do they abrogate and annul those rights. In re Baxter et al., 18 N. B. R. 560; Fed. Cas. 1,121.

3. The power of the justices of the supreme court to prescribe fees, commissions, etc., for the officers in bankruptcy is plenary, excepting that the fees cannot exceed the rate allowed by law at the time of the enactment of the Revised Statutes for similar services. In re Johnston and Hall, 12 N. B. R. 845; Fed. Cas. 7,422.

### SALES.

#### I. BY TRUSTEE (ASSIGNEE).

- (a) *General*.
- (b) *Real Estate*.

#### II. BY DEBTOR.

- (a) *General*.
- (b) *Preference*.
- (c) *When Valid*.

#### III. CONFIRMATION.

#### IV. WHEN SET ASIDE.

#### V. BY CREDITOR.

- (a) *General*.
- (b) *Before Adjudication*.
- (c) *After Adjudication*.
- (d) *Sheriff*.
- (e) *Security*.

#### VI. IN GENERAL.

See CLAIMS; EXEMPTIONS, 49; FRAUD, 25, 51-54, 62; INJUNCTION, 53; INSOLVENCY, 24; JUDGMENT, 38; LIENS, 19, 46, 63, 103; LIMITATIONS, STATUTE OF, 48; MARSHAL, 12; MORTGAGES, 20, 38, 67, 85, 87, 92, 133; PARTNERS, 105; PETITIONS, 26; PLEADING AND PRACTICE, 90; PLEDGE, 3; TRUSTEE, 54, 122.

#### I. BY TRUSTEE (ASSIGNEE).

- (a) *General*.

See COSTS AND FEES, 90; COURTS, 92, 106, II, (b), (2), 159, 245; EVIDENCE, 26; ESTATES, 155.

1. An assignee, directed by the court to sell certain goods at the highest price he could obtain, received an offer which was higher than one for which he had promised to sell them. He refused to entertain this higher price. *Held*, he should have rejected the first when the higher price was offered. In re Ryan et al., 6 N. B. R. 235; Fed. Cas. 12,182.

2. If an assignee make a sale of property, but refuse to deliver possession, he is liable to an action at law, if the sale has never been brought to the attention of the bankrupt court. Ives et al. v. Tregent, 14 N. B. R. 60.

3. A person who was present at the auction sale may testify as to the bid on which the sale was made. If it was fairly made, and the bids were understood by the auctioneer



and the bystanders, it is valid, although the assignee was present, and from inattention failed to comprehend the terms. *Id.*

4. The form of the order is sufficient that directs the sale of the right, title, etc., of the bankrupt, and it need not direct the sale of the right, title, etc., which the assignee acquired by the decree of bankruptcy. *Smith v. Scholtz et al.*, 17 N. B. R. 520.

5. A purchaser at a sale by an assignee stands on the same footing with a purchaser at an execution sale. He takes the estate of the bankrupt subject to all equities, whether he knows of them or not. *Steadman v. Taylor*, 17 N. B. R. 288.

6. In New York, where an execution against a judgment debtor gave priority over an assignee in possession of the goods, and where the sheriff had never had possession, the goods should be sold separately from other goods by the assignee, and the execution creditor should seek relief in the bankruptcy court. *In re Paine*, 17 N. B. R. 87; 9 Ben. 144; Fed. Cas. 10,673.

7. Where it is objected that the purchaser at an assignee's sale was the attorney for the assignee and incapable of purchasing, such objection must be set up in the bankruptcy court and not in a collateral action. *Spilman v. Johnson*, 16 N. B. R. 145.

8. Six months after the discharge of a bankrupt his assets were sold by the assignee, the purchaser afterwards selling them to the bankrupt. *Held*, that the bankrupt was entitled to use funds acquired subsequent to his discharge in the purchase of his own assets. *Phelps, Ass., v. McDonald et al.*, 16 N. B. R. 217.

9. In a schedule of assets, a claim against the government was marked worthless. The claim was sold by the assignee, and subsequently became valuable. *Held*, that the appreciation in the value of the claim did not affect the validity of the sale. *Id.*

10. In a charge of fraud in the sale of goods by the assignee, the value of the goods was not stated, nor was any agreement between the assignee and the purchaser shown. *Held*, too vague to arrest attention. *In re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 248; Fed. Cas. 10,866.

11. The law contemplates that the assignee himself shall sell the property of the

bankrupt, and the necessity for the employment of an auctioneer must be affirmatively shown or the auctioneer's charges will not be allowed by the court. *In re Sweet et al.*, 9 N. B. R. 48; 21 Pittsb. Leg. J. 82; Fed. Cas. 13,688.

12. A sale by the marshal, as messenger, under a special order, prior to the appointment of assignee, is to be considered as a sale made by a provisional assignee. *In re Hitchings*, 4 N. B. R. 125; Fed. Cas. 6,542.

13. In a sale by the marshal as messenger, under a special order of the court, prior to the appointment of an assignee, of the lease, good-will and fixtures of a grocery store, only such things, or their accessories, as are actually or constructively fastened to the freehold will pass to the purchaser of fixtures; and such purchaser at such sale may make claim upon the funds in the hands of the assignee for the value of such articles as were included under the sale of the fixtures and afterwards resold as movables. *Id.*

14. The property of a bankrupt corporation being sold at the petition of the assignee, under a mortgage, the proceeds of the sale were not sufficient to pay the debt. *Held*, that only the actual costs of the sale were chargeable upon the proceeds of the sale. *In re Blue Ridge R. Co.*, 18 N. B. R. 815; 2 Hughes, 224; 8 Chi. Leg. News, 290; 4 Amer. Law Rec. 456; Fed. Cas. 1,570.

15. An assignee's solicitor cannot bid at the assignee's sale. *Citizens' Bank v. Ober*, 18 N. B. R. 328; 1 Woods, 80; Fed. Cas. 2,731.

### (b) *Real Estate.*

See COURTS, 45, II, (b), 2.

16. When an assignee sells incumbered property without any order of the court, he sells it subject to all lawful incumbrances, and can convey no better interest than the bankrupt could have done. *Ray v. Brigham et al.*, 12 N. B. R. 145.

17. A petition was filed by an assignee to dissolve an injunction obtained by himself against the foreclosure of a mortgage, and to sell the property. *Held*, that the petition must be dismissed because he did not apply at the commencement of proceedings for a stay. *In re Brinkman*, 6 N. B. R. 541; Fed. Cas. 1,883.

18. Where a homestead was claimed under the act of 1868 of Georgia, by the wife, on land of her husband, who had been adjudged a bankrupt, *held*, that the wife could not have a homestead on the land of her husband as against the assignee of the bankrupt, or those claiming title thereto under a sale made by the assignee. *Lumpkin v. Eason*, 10 N. B. R. 549.

19. The assignee in bankruptcy prayed for orders authorizing the sale of realty surrendered by the bankrupt, free of all debts secured by mortgage thereon. The prayer was granted. *In re Barrow*, 1 N. B. R. 125; 1 Amer. Law T. Rep. Bankr. 63; Fed. Cas. 1,057.

20. It is not the duty of an assignee to petition the court for the sale of incumbered property of the bankrupt unless he believes such sale will produce a larger fund for the creditors. He may sell incumbered property without an order of court, subject to all lawful incumbrances. *In re Mebane*, 3 N. B. R. 91; Fed. Cas. 9,380.

21. The sale and transfer of the property and franchises of a railroad are not excluded from the operation of the bankrupt act of 1867 by reason of inherent difficulties in the sale and transfer. *Adams v. Boston, H. & E. R. R. Co.*, 4 N. B. R. 99; 1 Holmes, 30; 18 Pittsb. Leg. J. 154; Fed. Cas. 47.

22. An assignee redeemed certain real estate with general funds at the request of subsequent incumbrancers. After the sale of the real estate it was held that the general fund should be reimbursed out of the proceeds. *In re Longfellow et al.*, 17 N. B. R. 27; 2 Hask. 221; Fed. Cas. 8,486.

23. In a sale of real estate discharged of liens, by an assignee, interest on such liens should be allowed to the date of the report of distribution. *In re Devore*, 16 N. B. R. 56; 24 Pittsb. Leg. J. 185, 187; Fed. Cas. 3,847.

24. Where property is incumbered, it will be taken for granted that the assignee sold subject to incumbrances, but the lien creditor must be notified before the sale takes place. *Meeks v. Whatley*, 10 N. B. R. 498.

25. If the interests of all parties demand it, the court will direct the assignee of a bankrupt corporation to sell its real estate, discharged of all liens excepting existing and recorded mortgages. *In re Nat. I. Co.*,

8 N. B. R. 422; 10 Phila. 274; 30 Leg. Int. 372; 20 Pittsb. Leg. J. 208; Fed. Cas. 10,045.

26. United States courts sitting in bankruptcy may allow an assignee to sell realty subject to a lien, and the bankrupt's estate to be settled, without any determination of rights under the lien, in which case a petitioner would retain the rights as against the purchaser. *Markson et al. v. Haney*, 12 N. B. R. 484.

27. After a bankrupt's discharge, an order will not be issued directing the assignee to sell real estate to which the bankrupt did not have a legal title at the date of adjudication, and which was not included in his schedule of assets, to satisfy an alleged lien created by a judgment recovered prior to adjudication. *In re Dean*, 3 N. B. R. 188; Fed. Cas. 3,701.

## II. BY DEBTOR.

### (a) *General.*

28. The sale of a mortgage, not due, by its owner, a manufacturing company wishing to realize money for the use of its business, is not "out of the usual and ordinary course of business." The sale is valid as against the assignee in bankruptcy. *Judson v. Kelyt*, 6 N. B. R. 165; 5 Ben. 348; Fed. Cas. 7,567.

29. Where a person acts as agent and attorney for his brother in buying and selling merchandise, at an office with a sign having his brother's name on it, and was well known by those who had dealings with him to be doing such business at that office, he carries on business within the meaning of the act. *In re Bailly*, 1 N. B. R. 177; 2 Ben. 437; Fed. Cas. 753.

30. An order of seizure was given against goods in the hands of a purchaser from the bankrupt, and the sale was afterwards adjudged fraudulent; upon giving bond with sureties, the goods were returned to the purchaser. In proceedings to set aside the sale a decree was entered declaring the sale fraudulent, and the purchaser prosecuted two unsuccessful appeals, executing bonds for the same with different sureties. Execution issued against the purchaser, and part of the sum due under the decree was paid. On petition by the assignee against the sureties on

the original delivery bond for the balance due, the purchaser having died insolvent, but leaving real estate not sufficient to satisfy the amount of the decree, *held*, that the assignee might proceed against the sureties in the original bond, and need not subject the real estate of the fraudulent purchaser before so doing. *Stores et al. v. Engel et al.*, 19 N. B. R. 90; 3 Hughes, 414; Fed. Cas. 13,494.

31. Bankrupts sold to certain claimants goods, fixtures and machinery on the premises, and the right to use the premises of which they were lessees for a specified period. Before the time expired the bankrupts made default in the payment of rent and the claimants were evicted. The register assessed their damages for breach of covenant at the rate of rent payable by the bankrupts. *Held*, that the measure of damages was the fair rental value. In *re Bonnett et al.*, 19 N. B. R. 168; Fed. Cas. 1,633.

32. Inadequacy of price as evidence of fraud in a sale by an insolvent vendor should be left to the jury. *Rhoads v. Blatt*, 16 N. B. R. 32.

33. Payments, sales or transfers of any character declared void by the bankrupt law, and a fraud upon it, are only void against persons claiming under proceedings in bankruptcy or in the course of administration of a bankrupt's estate. *Berryman v. Allen*, 15 N. B. R. 113.

34. A bankrupt sold his property for a nominal sum, by a fraud (falsely stating the sale was made subject to a mortgage of greater value than the property), and a second purchaser, with notice, bought at the sheriff's sale. *Held*, that the last purchaser took no better title than his vendor had. *Harrell v. Beall, Ass.*, 9 N. B. R. 49; 17 Wall. 590.

35. A debtor in failing circumstances cannot convey his land even for valuable consideration, and yet secretly resume the right to occupy it for even a limited time, although the right to occupy for a limited time is part consideration for the sale. *Lukins v. Aird*, 2 N. B. R. 27; 6 Wall. 78.

36. A sale of a stock of goods not made in the usual and ordinary course of business of the debtor, who is a retail dealer, is *prima facie* evidence of fraud and avoids the sale. In *re Deane et al.*, 2 N. B. R. 29; 15 Pittsb. Leg. J. 581, 583; Fed. Cas. 3,700.

37. A. made a bill of sale of the stock in his store to B., with a verbal agreement that A. should remain in possession and carry on the business under his own name until B. should take possession. *Held*, that the bill of sale was void as to creditors, and that B. was not entitled to recover the goods from A.'s assignee. In *re Morrill*, 8 N. B. R. 117; 2 Sawy. 356; Fed. Cas. 9,821.

38. A sale of property by a bankrupt out of the usual course of business is presumptively fraudulent, but this presumption may be rebutted by evidence *aliunde*. *Babbitt v. Walbrun et al.*, 4 N. B. R. 30; 1 Dill. 19; 2 Chi. Leg. News, 235; Fed. Cas. 694.

### (b) Preference.

See PREFERENCES, 167, 168, 237, 260; CLAIMS, 47; ESTATES, 31.

39. The sale of a stock of goods with the fixtures to a creditor, he giving his notes for the balance above his claim, and being aware that the debts of the seller greatly exceed his assets, is not made in the usual course of business and is void under the bankruptcy act of 1867. In *re Kahley*, 4 N. B. R. 124; 2 Biss. 383; 3 Chi. Leg. News, 85; 2 Leg. Gaz. 405; Fed. Cas. 7,593.

40. A bankrupt may sell property to raise money for means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and the sum is reasonable in amount. In *re Keefer*, 4 N. B. R. 126; 3 Chi. Leg. News, 125; Fed. Cas. 7,636.

41. A sale by a person contemplating bankruptcy is not *prima facie* fraudulent unless surrounded by unusual circumstances, and is not then void as to purchasers in good faith. In *re Hunt*, 2 N. B. R. 166; 1 Chi. Leg. News, 169; Fed. Cas. 6,881.

42. On a bill in equity to set aside the sale of certain stores of the bankrupt, *held*, that as it appears that the stores were sold at a fair price before insolvency and the transactions honest ones, they cannot be impeached. *Sedgwick v. Wormser*, 7 N. B. R. 186; Fed. Cas. 12,626.

43. A sale by a debtor, three months prior to being adjudged a bankrupt, of a portion of his property, made in good faith to raise money to discharge a debt, and where the

vendee has no reasonable cause to believe that the sale is made with fraudulent intent, is not in violation of the bankrupt act. *Tiffany v. Lucas*, 8 N. B. R. 49; 15 Wall. 410.

44. Sales of goods by a merchant in embarrassed circumstances, made for the purpose of raising money to pay debts, are not fraudulent, although less than cost is received and the purchaser has knowledge of the merchant's insolvency, and the sale is valid. *Sedgewick v. Lynch*, 8 N. B. R. 289; 5 Ben. 489; Fed. Cas. 12,615.

45. A. purchased logs with money furnished by B., under an agreement by which A. was to have two-thirds and B. one-third of the logs, each to use as necessity required, keeping account of the number used. B., knowing A. to be insolvent, took a bill of sale of all the logs remaining, receiving not more than he was entitled to. *Held*, no preference. *In re The Bousfield et al. Mfg. Co.*, 16 N. B. R. 489; Fed. Cas. 1,703.

46. B. sold to F. a stock of goods in a store together with the fixtures, the consideration to be paid by instalments. It was agreed that if F. defaulted in the payment of instalments, B. could treat the whole debt as due, take possession of, and sell the goods in satisfaction of the amount unpaid. *Held*, not a preference. *Field, Ass. v. Baker*, 11 N. B. R. 415; 12 Blatchf. 488; Fed. Cas. 4,762.

47. If a dealer sells goods for cash, but before the purchase is delivered the purchaser fails, the seller has a right to the goods, and the written assent of the insolvent purchaser is not an illegal preference in fraud of the bankrupt act. *In re Foote et al.*, 11 N. B. R. 153; 11 Blatchf. 530; Fed. Cas. 4,907.

### (c) *When Valid.*

48. Where there is no fraudulent intention, a dealer may, although insolvent, continue to sell his stock at retail, and endeavor to effect, if possible, a compromise with his creditors. *In re Munger et al.*, 4 N. B. R. 90; Fed. Cas. 9,923.

49. There is no concealment where a debtor makes a *bona fide* conversion of his property. He will not be adjudicated bankrupt simply because, after selling his property to go into a new enterprise, he does not prevent the same from being seized on a process of a

state court. *Fox v. Eckstein*, 4 N. B. R. 123; Fed. Cas. 5,009.

50. After a bill of sale of the fixtures used in the manufacture of tobacco, possession by the vendor is not *per se* fraudulent, under the rule in *Twyne's case* and under chapter 114 of the Virginia Code. *Howard et al., Ass. v. Prince*, 11 N. B. R. 322; 1 Hughes, 239; Fed. Cas. 6,762.

### III. CONFIRMATION.

51. The purchaser at an assignee's sale arranged with other parties to resell to them in case he became the purchaser. The sale was for cash and the resale was to be on time. The motion to confirm the sale was resisted, on the ground that improper influences were used to deter others from bidding. *Held*, that the arrangement was not such as to avoid the sale. *Citizens' Bank v. Ober*, 18 N. B. R. 328; 1 Woods, 80; Fed. Cas. 2,731.

52. The United States court for the district of Maine will not confirm sales made by assignees, but will leave the purchasers to establish their titles whenever occasions may arise. *In re Alden*, 16 N. B. R. 39; 23 Int. Rev. Rec. 234, 282; 9 Chi. Leg. News, 346; 25 Pittsb. Leg. J. 4; Fed. Cas. 151.

53. Where a sale of a bankrupt's estate has been made and confirmed by the court and conveyed by the assignee, the circuit court under the act of 1867 was without jurisdiction at the suit of the purchaser to enjoin a sale of the same lands about to be made upon the order of a state court. *Sargent v. Helton*, 115 U. S. 348.

### IV. WHEN SET ASIDE.

See CLAIMS, 212.

54. In proceedings to vacate a composition, *held*, that a sale of the bankrupt's stock and fixtures, prior to bankruptcy, would not be set aside on the ground of inadequacy of price. *In re Shaw et al.*, 19 N. B. R. 512; Fed. Cas. 12,716.

55. A debtor was adjudged a bankrupt, and had a valuable interest in certain realty, which he omitted from his schedule, he claiming that the interest was not recoverable. The assignee petitioned for leave to

sell the claim at public or private sale, and on the same day an order was made authorizing the sale, which was, also on the same day, made privately, without notice. It was held that the order was void and the sale a nullity. *In re Major*, 14 N. B. R. 71; 2 Hughes, 273; 23 Pittsb. Leg. J. 196; Fed. Cas. 2,061.

56. A bankrupt, a British subject, held a claim against the United States, which was marked on his schedule as worthless, and was sold for \$20 to W., who purchased it at the request of bankrupt and with money furnished by him. Afterwards an award was made by the commission sitting under the treaty between the United States and Great Britain for \$187,190. *Held*, that the sale to W. was invalid. *Phelps, Ass., v. McDonald et al.*, 19 N. B. R. 187; 99 U. S. 298.

57. The purchase from a general assignee of property, which a few months afterward is held at a vastly increased price, cannot be regarded as made in good faith, and may be set aside. *In re Mott*, 1 N. B. R. 9; Fed. Cas. 9,879.

58. When a sale by a general assignee is set aside by the court upon the ground of fraud, an application for the return of the purchase-money will not be granted unless the deeds be surrendered to be canceled. *Id.*

59. The purchase-money will be returned when the sale is set aside, where property has been improperly taken from a receiver and sold under an order of the district court. *Davis et al., Trustees, v. Railroad Co. et al.*, 13 N. B. R. 258; 1 Woods, 661; Fed. Cas. 3,648.

60. A creditor bought stock held as collateral security for his debt, worth \$25 a share, for \$10 a share. *Held*, that the sale should be set aside and a resale ordered. *In re Bousfield et al.*, 16 N. B. R. 481; Fed. Cas. 1,702.

61. A sale of stock, held by a creditor as collateral security, to such creditor for two-fifths of its value, will be set aside and another sale ordered. A bankrupt court has discretion to refuse to confirm a sale for mere inadequacy of price, such sale being subject to the approval of the court. *Id.*

62. Long after the time specified in the rule an assignee filed a report of sales made of goods belonging to the estate of property set off to the bankrupt as exempt, which report was approved on the same day. *Held*, that the

order of confirmation should be revoked. *In re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

63. The discretionary power belonging to a court of bankruptcy to take possession of the property of a bankrupt, subject to liens exceeding the value of the property, and to dispose of it for the purpose of satisfying, as far as possible, those liens, should not be exercised; and an order directing the sale of property so incumbered, though not void for want of jurisdiction, will be set aside on petition for review as a discretion improperly exercised. *In re Dillard*, 9 N. B. R. 8; 2 Hughes, 190; 6 Amer. Law T. Rep. 490; 21 Pittsb. Leg. J. 82; Fed. Cas. 3,912.

64. Sales of property void under a state statute of frauds are also void under the bankrupt law, and an assignee is authorized to pursue the property thus transferred, and, as auxiliary to its recovery, to ask that the sales by the bankrupt be annulled. *Massey et al. v. Allen*, 7 N. B. R. 401; 17 Wall. 351.

65. A debtor who had sold his entire stock in trade to his father-in-law, but remained in possession and exercised the offices of ownership over the same, filed his petition in bankruptcy and failed to include the property so sold in his inventory, or disclose his interest therein. *Held*, that the sale was fraudulent and void as to creditors, and that the title to said property vested in his assignee upon his adjudication, and that he was guilty of concealment of said property. *In re Hussman*, 2 N. B. R. 140; 2 Amer. Law T. Rep. Bankr, 58; 1 Chi. Leg. News, 177; Fed. Cas. 6,951.

66. Pending the appointment of an assignee, the assets of the bankrupt's estate were sold by order of court to a friend of the bankrupt, the bankrupt continuing in possession of and selling the same. *Held*, that the sale was void. *March, Ass., v. Heaton et al.*, 2 N. B. R. 66; 1 Lowell, 278; Fed. Cas. 9,061.

67. L. was a member of the firm of W., L. & Bro. L. became surety on notes for K. & Co., who subsequently became bankrupt, L. being exposed to the payment of the notes of the bankrupts K. & Co. He then applied to the F. A. G. S. I. to make arrangements to meet his liability as indorser on the notes of K. & Co., giving his personal note and deed of trust of his interest in the firm of

W., L. & Bro. as security. Later L. became bankrupt, and the F. A. G. S. I. sold the interest of L. in the firm of W., L. & Bro., his note to the S. I. not being paid. The assignee filed his bill to set aside the sale as having been made after the bankruptcy of L., and to set aside the deed of trust as being made with a view of preference. *Held*, that the deed of trust was valid, and that as the respondent enforced its security without proving its debts, the sale was invalid. The respondent subsequently proved his debt and the sale was confirmed. *In re Lee, Ass., v. Franklin Ave. Ger. Sav. Inst.*, 3 N. B. R. 53; 1 Chi. Leg. News, 370; Fed. Cas. 8,188.

68. Where a wife's right of dower is established by the decisions of the court against the assignee in insolvency, an exception to the confirmation of the sale of certain real estate by the purchaser on the ground that such sale was subject to the dower right, when it was stated at the sale that the property would be conveyed free from incumbrances, will be sustained. *In re Angier*, 4 N. B. R. 199; 1 Amer. Law T. Rep. Bankr. 248; Fed. Cas. 388.

## V. BY CREDITOR.

### (a) *General.*

See ESTATES, 269.

69. A purchaser of real estate at a foreclosure sale moved to be discharged from his purchase on the ground that the title was defective by reason of proceedings in bankruptcy having been begun against the owners of the equity of redemption. Motion denied. *Lenihan v. Haman et al.*, 11 N. B. R. 471.

70. The purchase of both partners' interests at sales under different executions does not enlarge the interests acquired, nor relieve the assets from the claims of partnership creditors. *Osborne v. McBride*, 16 N. B. R. 22; 8 Sawy. 590; Fed. Cas. 10,593.

71. A. purchased goods, inducing the vendors to give credit by false representations of his ability to pay, and without which the sales would not have been made. *Held*, that the debts were created by fraud. *In re Alsborg*, 16 N. B. R. 116; Fed. Cas. 261.

72. Sales made to parties insolvent, with

the hope of thus being able to obtain a preference and knowing of insolvency, will not be upheld, but such parties must share as general creditors. *Harrison v. McLaren*, 10 N. B. R. 244; Fed. Cas. 6,139.

### (b) *Before Adjudication.*

See ESTATES, 148.

73. A party who has levied an execution upon the property of the bankrupt before adjudication ought not to proceed to a sale without permission of the bankrupt court, and if he does so the sale may be set aside, and he may be held liable for the value of the property regardless of the amount realized upon the sale. *In re Huftnagel*, 12 N. B. R. 554; Fed. Cas. 6,837.

74. Where a judgment creditor has made a levy upon the property of the bankrupt before filing of the petition, and after the commencement of proceedings procures the sheriff to sell the property, the court may set aside the sale, or confirm it and permit the creditor to retain the proceeds, where the creditor acted under a misapprehension of his duty and the property brought its full value. *Id.*

75. A. had the exclusive right to sell B.'s machines, with the understanding that he was to pay for them if sold within a certain time, and if not, he was "to take them for the next season," and the transaction appeared upon A.'s books and B.'s invoices as a sale. *Held*, that the property in the machine passed to A. upon delivery, and upon A.'s bankruptcy to his assignee. *Wood M. & R. M. Co. v. Brooke*, 9 N. B. R. 395; 2 Sawy. 576; Fed. Cas. 17,980.

76. An agreement concerning the sale of specific chattels transfers the property therein to the purchaser, in consideration of his becoming bound to pay the price therefor; but the intent always governs, and the contract may provide that, although possession be given to the purchaser, the property shall remain in the seller until payment. *Id.*

### (c) *After Adjudication.*

77. A proceeding to foreclose a mortgage was pending in a state court at the time of the institution of proceedings in bankruptcy.

A decree was rendered and a sale had after the beginning of bankruptcy. *Held*, that the proceedings did not affect the state court's jurisdiction, and the sale passed a valid title. *Eyster v. Gaff et al.*, 18 N. B. R. 546; 91 U. S. 531.

78. A creditor who, at the time of the bankruptcy, has in his hands chattels of the bankrupt, with a power of sale, or chases in action with a power of collection, may sell the goods or collect the claims and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect would have been revocable by the bankrupt before his bankruptcy. *In re Dow et al.*, 14 N. B. R. 807; 2 Lowell, 472; Fed. Cas. 17,578.

79. A. owed B. a debt, against which there was no defense. Suit was brought and delayed. When judgment was had and execution issued, A. secured a delay in the sale. A. becoming a bankrupt before the sale, it was held that B. had not been given a preference under the bankrupt act. *Tenth Nat. Bank et al. v. Warren et al., Ass.*, 17 N. B. R. 75; 96 U. S. 539.

80. The power to execute a deed in a mortgagor's name is not affected by his bankruptcy, although the sale, under the power contained in the mortgage, took place after the commencement of the proceedings in bankruptcy. *Hall v. Bliss et al.*, 14 N. B. R. 329.

81. A deed of bargain and sale may operate as a covenant to stand seized, when it is necessary that it should have that effect, in order to carry out the manifest intention of the parties. *Id.*

82. The holder of a mortgage containing a power of sale may become a purchaser at a sale under the power if the mortgage so provides. *Id.*

83. A sale of mortgaged premises by a trustee under a power of sale contained in the mortgage, made after the mortgagor has become bankrupt, is void *per se*. *Lockett v. Hoge*, 9 N. B. R. 167; Fed. Cas. 8,444.

84. A trustee under a deed of trust executed prior to the commencement of proceedings in bankruptcy against the creditor sold the land after such proceedings, though notified of the same, but prior to the appointment of an assignee. *Held*, that the sale was void-

able, not void. *McGready v. Harris*, 9 N. B. R. 135.

85. Two days prior to filing a petition against the mortgagor, the mortgagee, by virtue of his power to sell, made sale by auction of the mortgaged premises, but the purchasers declined to make payment as per conditions of the sale or to receive the deed, whereupon the mortgagee, after petition, advertised the premises for sale. *Held*, that the bankrupt court had power to and should enjoin the mortgagee from proceeding. *Whitman v. Butler*, 8 N. B. R. 487; Fed. Cas. 17,579.

86. A bankrupt was indebted to a creditor, the debt being secured by a deed of trust, and shortly after the adjudication the trustee named in said deed advertised and sold the property secured. *Held*, that such sale could only be valid by permission of the court after the creditor had proved his claim in the proceedings. *In re Davis, Ass., et al.*, 2 N. B. R. 125; 2 Amer. Law T. Rep. Bankr. 52; 1 Chi. Leg. News, 171; Fed. Cas. 8,618.

#### (d) *Sheriff.*

See ATTACHMENT, 23, 24, 62; ESTATES, 120, 272.

87. The assignee is entitled to the surplus proceeds of a sheriff's sale of the bankrupt's real estate as against a judgment creditor who has waived his lien and proved his claim. *Wallace v. Conrad*, 3 N. B. R. 10.

88. Before a voluntary petition was filed execution issued upon a judgment, and the sheriff levied on and held personal property of the bankrupt. The levy was held to be good and the sheriff was authorized to sell the property. *In re Smith et al.*, 1 N. B. R. 169; 2 Ben. 432; 1 Amer. Law T. Rep. Bankr. 112; Fed. Cas. 12,973.

89. Where a levy was made before the commencement of bankruptcy proceedings, the possession and legal title being in the sheriff for the purpose of satisfying the process in his hands, he, as trustee, may sell the property unless enjoined from so doing. *Jones v. Leach et al.*, 1 N. B. R. 165; Fed. Cas. 7,475.

90. Where a sheriff sold perishable goods under an attachment by order of a state court without notice of the adjudication of the defendant in bankruptcy, he was guilty

of conversion and is liable for the market value of the goods so converted. *Long, Ass., v. Conner, Sheriff*, 17 N. B. R. 540; Fed. Cas. 8,479.

91. If there be a recovery of judgment before bankruptcy, the sheriff may sell, but the bankrupt court has the right to cause the sale to be made under its supervision. *Allen et al. v. Montgomery et al.*, 10 N. B. R. 503.

(e) *Security.*

92. A suit to foreclose a mortgage was filed and a receiver was appointed before the institution of proceedings in bankruptcy. The bankrupt court ordered the mortgaged property to be taken out of the hands of the receiver and delivered to the assignee. This was done, and the property was sold. *Held*, that the sale was void and that the trustees under the mortgage could recover the property from the purchasers. *Davis et al., Tr., v. Railroad Co. et al.*, 13 N. B. R. 258; 1 Woods, 661; Fed. Cas. 3,648.

93. No permission to sell securities that are the property of a bankrupt should be granted to creditors until their right to do so is shown, as prescribed in section 22 of the act of 1867. *In re Bigelow*, 1 N. B. R. 186; 2 Ben. 480; 1 Amer. Law T. Rep. Bankr. 95; Fed. Cas. 1,396.

94. Certain property was conveyed by bill of sale, and certain promissory notes were given therefor, all of which excepting the last were paid. Payment of the last was refused, and soon after the purchaser became bankrupt. The assignee refused payment on the ground that the bill of sale was not recorded in the town wherein the purchaser resided. It appeared that it was recorded in the town where the purchaser stated that he resided. The assignee was therefore ordered to pay the amount due, with costs. *Allen v. Whittemore, Ass.*, 14 N. B. R. 189; 8 Ben. 485; Fed. Cas. 241.

95. Where a sale is made after the commencement of proceedings in bankruptcy, under a decree entered before the adjudication, in an action to foreclose a mortgage in a state court, and a decree for the deficiency is entered against the bankrupt, the decree is a bar to the right of the assignee to raise the question of usury in regard to the mort-

gage. *Cutter, Ass. etc., v. Dingee*, 14 N. B. R. 294; 8 Ben. 469; Fed. Cas. 3,518.

96. The value of a security cannot be ascertained by the creditors sending it to an auctioneer and having it advertised and sold at auction. *In re Hunt*, 17 N. B. R. 205; 35 Leg. Int. 71; Fed. Cas. 6,884.

97. In the schedule of liabilities the plaintiff's claim was represented as secured. The plaintiff was present at the composition proceedings and neither objected nor assented. On sale of the property, which was security for his debt, less than the amount of the debt was realized. *Held*, that the plaintiff was entitled to the percentage agreed upon at the composition, of his unpaid debt. *Paret v. Ticknor et al.*, 16 N. B. R. 315; 4 Dill. 111; 5 Cent. Law J. 328; Fed. Cas. 10,711.

98. A sale by a creditor of property of a debtor in his possession and on which he has a valid lien will not be disturbed by the fact that the debtor was insolvent and that the creditor knew it, provided there was no fraud and the property was sold for a fair price. *In re Roseberry et al.*, 16 N. B. R. 340; 8 Biss. 112; Fed. Cas. 12,052.

99. A sold a tobacco outfit to B, reserving title in himself until B should pay for it. B gave C. a deed of trust on it and later sold it to D. D. becoming bankrupt, it was sold by consent, when it was held that the balance due A. should be paid prior to the sum due C. *In re Binford*, 17 N. B. R. 353; 3 Hughes, 295; Fed. Cas. 1,411.

100. A stipulation in a sale of personal property reserving title in the vendor is, in the absence of fraud, valid against purchasers of the vendee for value and without notice. *Id.*

101. The claim of the wife's separate estate is prior to that of judgment creditors where the separate estate has been used to improve property of the bankrupt with an agreement that the property is to be deeded to the wife, and the claim should be paid out of the proceeds of the sale of such property. *In re Campbell*, 17 N. B. R. 4; 3 Hughes, 276; Fed. Cas. 2,848.

102. H., a bankrupt, was indebted to R. for rent, and as security gave R. a bill of sale of a musical instrument, which he delivered to R. Subsequently H. borrowed the instru-



ment, agreeing to return it, but had exclusive use of it several months before he went into bankruptcy. R. petitioned to have his lien enforced. *Held*, that he had waived whatever right he might otherwise have had under the bill of sale, and that the transaction was a pledge and not a mortgage. In re Harlow, 10 N. B. R. 280; Fed. Cas. 6,070.

103. Where there are two mortgages and the proceeds of a sale in bankruptcy are sufficient to pay off the first mortgage as well as costs and expenses, the senior mortgagee is entitled to be paid in full, the same as he would in a case of a sale by way of foreclosure of the mortgage. In re Bartenbach, 11 N. B. R. 61; 2 Amer. Law T. Rep. (N. S.) 38; Fed. Cas. 1,068.

104. A creditor holding certain securities pledged for his debt applied to the court for an order for a sale of such securities to satisfy said debt, before the appointment of an assignee. *Held*, that a sale could not be ordered until such appointment. In re Grinnell et al., 9 N. B. R. 29; 7 Ben. 42; 21 Pittsb. Leg. J. 82; Fed. Cas. 5,830.

105. A sale cannot be ordered by the court until the appointment of an assignee, as such a course would prevent the election given to the assignee by the act: 1. To redeem the property pledged; 2. To sell it subject to the lien; and 3. To release the equity of redemption at an agreed price. *Id*.

106. A sale made by a creditor secured by a deed of trust, after the commencement of proceedings in bankruptcy, without permission of the bankrupt court, will be set aside. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill. 50; 6 West. Jur. 451; Fed. Cas. 13,071.

107. A mortgagee bid in the property at the mortgage sale for a sum less than the mortgage debt and interest. The court did not err in requiring the mortgagee to pay the costs and expenses of the sale out of the amount bid. In re Ellerhorst et al., 7 N. B. R. 49; 2 Sawy. 219; Fed. Cas. 4,380.

108. S. B. & Co. held a lien as security to them on letters patent of the bankrupt. It was ordered by the court that said letters patent should be sold jointly by the assignee and S. B. & Co. and the funds obtained deposited pending a settlement of the suit. In re Columbian M. Works, 3 N. B. R. 18; Fed. Cas. 8,039.

## VI. IN GENERAL.

109. The provision of the bankrupt act avoiding certain sales applies to sales of bankrupts, not of insolvents. *Bromley v. Goodrich et al.*, 15 N. B. R. 289.

110. When a consignment is made and bills of exchange are drawn for the value, and bills of lading are sent to a third person to be delivered on payment of the bills of exchange, a sale is made in which a general property passes to the consignee, and a special property is reserved by the consignor until the payment of the value. In re Chamberlain, 12 N. B. R. 230; 2 Hughes, 264; 14 Amer. Law Reg. (N. S.) 688; 4 Amer. Law Rec. 804; Fed. Cas. 4,855.

111. When, under an unrecorded bill of sale, possession is taken of the chattel, under the Massachusetts statutes, the instrument is valid against third persons from the time of its execution unless intervening rights have obtained. *Sawyer et al. v. Turpin et al.*, 13 N. B. R. 271; 91 U. S. 114.

112. Where a sale is made conditioned upon the goods (machinery) being delivered and set up for use, a direction to a servant of the purchaser by the agent to finish placing the machinery, and that he, the agent, would pay the purchaser, is not a waiver of the contract so that title will pass to the purchaser if he becomes bankrupt before the work is done. In re Pusey, 6 N. B. R. 40; Fed. Cas. 11,477.

113. Where a partnership is dissolved and the whole stock transferred to the only solvent partner, for the purpose of settling the partnership affairs, a sale by the partner of such stock is not an act of bankruptcy, for it was designed that a sale by gross should be made, and the statutory presumption is rebutted by the evidence. In re Weaver, 9 N. B. R. 132; Fed. Cas. 17,307.

114. A court of equity will in no instance expose to sale an interest capable of being reduced to certainty where any doubt exists as to its character and extent. *Sutherland et al. v. Lake Sup. S. C., R. & I. Co.*, 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,648.

115. To be a *bona fide* purchaser without notice, a person must be without notice of the equities sought to be enforced at the time of

payment of the consideration. *Marsh et al., Ex'rs, v. Armstrong*, 11 N. B. R. 125.

116. The district court does not have power to order in a summary way the sale of an estate if it appears that it is in the hands of a third person claiming absolute title to it, whether derived from the bankrupt or not. *Knight v. Cheney*, 5 N. B. R. 305; Fed. Cas. 7,888.

117. Money arising from the sale of property attached represents the property. Money arising from the sale of household property sold under an attachment belongs to the bankrupt as an exemption if claimed. In re *Ellis*, 1 N. B. R. 154; Fed. Cas. 4,400.

118. District courts do not possess the power to order in a summary way the sale of property, although the same is claimed by the assignee, even though the title thereto is in dispute, if it also appears that the estate is in the possession of a third person holding the same and claiming absolute title to it as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner. *Gifford et al. v. Helms et al.*, 19 N. B. R. 113; 98 U. S. 248.

119. A motion to expunge an order for sale of such choses in action belonging to the estate of the bankrupt as "could not be collected without inconvenient delay or expense" was made by the register. *Held*, that the register had the power to make such order. In re *The Bank of N. C.*, 19 N. B. R. 164; Fed. Cas. 896.

120. A party who has levied an execution upon the property of the bankrupt before adjudication ought not to proceed to a sale without such permission, and if he does so the sale may be set aside, and he may be held liable for the actual value of the property, regardless of the amount realized upon the sale. In re *Hufnagel*, 12 N. B. R. 554; Fed. Cas. 6,837.

121. The bankrupt court has authority to order the sale of property pledged or mortgaged by a bankrupt, and the proceeds to be brought into court, to await the determination of the rights of the pledgee or mortgagee. In re *The Columbian Metal Works*, 3 N. B. R. 18; Fed. Cas. 8,039.

122. Commission merchants and pork packers who in the course of business made advances of money for the purchase of hogs

which they afterwards packed, under an agreement with the parties to whom such advances were made, stipulated for a lien upon the hogs to secure their advances with interest and their charges and commissions. On the eve of the bankruptcy of a consignor and knowing that such bankruptcy was impending, they sold hogs in their possession consigned by the bankrupt and applied the proceeds to their debt. *Held*, that the sale should not be disturbed. In re *Roseberry et al.*, 16 N. B. R. 340; 8 Biss. 113; Fed. Cas. 12,052.

123. If goods are sold for cash, but the price is not paid, the non-payment will warrant a rescission of the sale. In re *Foot et al.*, 11 N. B. R. 153; 11 Blatchf. 590; Fed. Cas. 4,907.

124. A sale of stock, held by a creditor as collateral security, to such creditor for two-fifths of its value, will be set aside, and another sale ordered. A bankrupt court has discretion to refuse to confirm a sale for inadequacy of price, such sale being subject to the approval of the court. In re *Bousfield & Poole*, 16 N. B. R. 481; Fed. Cas. 1,702.

125. A creditor who takes a bill of sale of property purchased with money furnished by him is not given a preference where such bill of sale does not include more than he was entitled to. In re *The Bousfield Mfg. Co.*, 16 N. B. R. 489; Fed. Cas. 1,706.

126. After the adjudication of bankruptcy, the defendant, even prior to his discharge, is as much at liberty as any other person to purchase property surrendered by him. *Traer v. Clews*, 115 U. S. 528.

127. The sale by an assignee of all his property for a nominal sum does not pass a claim for a larger amount concealed by the bankrupt from the assignee. Such claim, when afterwards recovered by the bankrupt, could be reached by a creditor after a discharge. *Clark v. Clark*, 17 How. 315.

128. The interest of a tenant in common, not exceeding \$5,000 in value, in the dwelling-house and land occupied by him as a homestead, is, by the Nevada constitution and laws, exempt from forced sale. In re *Swearing & Lamar*, 17 N. B. R. 188; Fed. Cas. 13,683.

129. Where the exercise of the power of sale contained in a chattel mortgage will in-

juriously affect the interests of the general creditors of a bankrupt, a court of equity may restrain such sale. *Dwight et al. v. Ames et al.*, 2 N. B. R. 147; Fed. Cas. 4,214.

### SATISFACTION.

See ATTACHMENTS; JUDGMENTS, II; MORTGAGES, 147.

### SAVINGS BANK.

See BANKS.

### SCHEDULES.

- I. LIST OF CREDITORS.
- II. AMOUNT OF DEBTS.
- III. AMOUNT OF ASSETS.
- IV. IN RELATION TO DISCHARGE.
- V. AMENDMENT.
- VI. VERIFICATION.
- VII. FRAUD.
- VIII. IN GENERAL.

See EXEMPTIONS, 72; LIMITATIONS, STATUTE OF, 9, 26; PARTNERS, 86; PETITIONS, 116; PLEADING AND PRACTICE, 143; REFERENCE, 11.

#### I. LIST OF CREDITORS.

See COURTS, 98.

1. A's claim was omitted from a bankrupt's schedule, and no notice was given him of the proceedings except by publication. *Held*, that A's claim was barred by the discharge, in the absence of averment and proof that such omission was fraudulent. *Platt v. Parker*, 13 N. B. R. 14.

2. An involuntary petition was filed since December 1, 1873, and the alleged bankrupt made denial of acts of bankruptcy and demanded a jury trial. *Held*, under section 39 (act of 1867), as amended June 22, 1874, that he was required to file a list of creditors and the amount of their claims. *The Warren Sav. Bank v. Palmer & Co.*, 10 N. B. R. 239; 10 Phila. 286; 81 Leg. Int. 261; 6 Chi. Leg. News, 866; 21 Pittsb. Leg. J. 193; Fed. Cas. 17,207.

3. The bankrupt is required to file a full list of his creditors, with their places of resi-

dence and the sums due them respectively. *In re Rosenthal*, 10 N. B. R. 191; 1 Cent. Law J. 864 (note); 6 Chi. Leg. News, 842; 81 Leg. Int. 254; Fed. Cas. 12,062.

4. The debtor is not obliged to give a schedule of his creditors until a *prima facie* case is made against him as to the number and value of his creditors (amendatory act of 1874). *In re Scammon*, 10 N. B. R. 66; 1 Cent. Law J. 828; 20 Int. Rev. Rec. 33; Fed. Cas. 12,430.

5. Where it appears at the first meeting of creditors that the names of certain creditors by whom claims against the estate are presented do not appear upon the schedule, the proof of such claims should be postponed until after the election of an assignee. *In re Milwain*, 12 N. B. R. 358; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 9,623.

6. The omission to place a claim upon a list of creditors is merely a circumstance of suspicion. *In re Mendelsohn*, 12 N. B. R. 533; 8 Sawy. 342; Fed. Cas. 9,420.

#### II. AMOUNT OF DEBTS.

7. A judgment in favor of a bankrupt should be set forth in his schedule. *In re Sallee*, 2 N. B. R. 73; 2 Amer. Law T. Rep. Bankr. 7; Fed. Cas. 12,256.

8. A debt barred by the statute of limitations of Maine is not revived by its entry on the schedule of liabilities of the bankrupt. *In re Harden*, 1 N. B. R. 97; 1 Hask. 163; 15 Pittsb. Leg. J. 843; Fed. Cas. 6,048.

9. The failure of a bankrupt to state upon the schedule the nature of a debt, if it be a fiduciary one, makes him guilty of fraud. *Chapman v. Forsyth*, 2 How. 202.

10. Debtors should set down in the schedules all the paper they are liable on, with proper explanations. *In re Henry et al.*, 17 N. B. R. 463; 9 Ben. 449; Fed. Cas. 6,370.

11. In an action brought under sections 35 and 39 of the act of 1867, the bankrupt's schedule of indebtedness is not material evidence of insolvency. *Tyler, Ass. v. Brock et al.*, 17 N. B. R. 239.

12. A mistake without fraud, made by the debtor in his statement of the amount due a creditor, will not vitiate a composition. *In re Trafton*, 14 N. B. R. 507; 2 Lowell, 505; Fed. Cas. 14,133.

13. Where the district court determines that a statement of the debts sufficiently states the address of a creditor, the decision is binding in a collateral action. *Smith et al. v. Engle et al.*, 14 N. B. R. 481; R. S. 5044.

14. Where a decree requires the statement of debts and assets to be filed, the presumption in a collateral action is that it was done as directed. *Id.*

15. In the schedule furnished by the bankrupt in composition proceedings, one debt was understated, but not intentionally. *Held*, that such mistake would not avoid the composition. *Beebe v. Pyle*, 18 N. B. R. 162.

### III. AMOUNT OF ASSETS.

See ASSIGNMENTS, 54; COMPOSITION, 50; ESTATES, 183, 217, 218, 219, 245.

16. Where a husband's equitable interest in the estate of the wife has been levied upon and sold, the husband has no longer any interest therein to be returned in his schedule. *In re Hummitsh*, 2 N. B. R. 3; 15 Pittsb. Leg. J. (O. S.) 494; Fed. Cas. 6,866.

17. Where a bankrupt included in his schedule land formerly deeded to his children, this fact cannot affect the rights of his grantees. *Adams v. Collier*, 122 U. S. 382.

18. A merchant is under obligation to his creditors to exhibit a statement of his accounts when demanded, and if he fails to do so he cannot complain of proceedings in bankruptcy commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before the trial. *Perin et al. v. Peale*, 17 N. B. R. 377; Fed. Cas. 10,981.

19. The fact that the schedules stated the real estate of the debtor as of unknown or uncertain value is not a good objection to a composition. *In re Welles*, 18 N. B. R. 525; Fed. Cas. 17,377.

20. Upon the question whether the bankrupt has made a full disclosure in accordance with an order, if application be made to review the decision of the district court, the court must be satisfied that the report of the bankrupt is such as a reasonable man could not credit. *In re Mooney et al.*, 15 N. B. R. 456; 14 Blatchf. 204; Fed. Cas. 9,748.

21. Where a bankrupt has failed to put property in his schedule, the right of the as-

signee to recover it is not barred by a discharge granted before discovery. *Maybin v. Raymond, Ass.*, 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,338.

22. Growing crops should be placed upon a bankrupt's schedule as personal property. *In re Schumpert*, 8 N. B. R. 415; Fed. Cas. 12,491.

### IV. IN RELATION TO DISCHARGE.

See 1 and 21, *ante*; DISCHARGE, 27, 83, 123, 181, 179, 184, 232, 315, 322.

23. The claim of a creditor is barred by a discharge, although he is without notice of the bankruptcy proceedings, provided such claim was fraudulently omitted from the schedule by the bankrupt. *Thurmond v. Andrews et al.*, 13 N. B. R. 157.

24. Specifications were filed against a discharge for corruptly omitting a certain item from the schedule and wilful false swearing to the truth of an affidavit annexed thereto, which specifications were overruled and a discharge granted. *Held*, that such action was not a determination of whether or not such item was an asset of the estate. *In re Nichols*, 19 N. B. R. 419; Fed. Cas. 10,237.

25. Suit was brought by the assignee to have the discharge set aside on the ground that a large amount of diamonds were omitted from the schedule of assets. The suit was not brought within two years after discharge. The statute of limitations was pleaded by the defendant and judgment was awarded him. *Pickett, Ass., v. McGavick*, 14 N. B. R. 236; 3 Cent. Law J. 303; 13 Alb. Law J. 218, 400; 2 N. Y. Wkly. Dig. 378; Fed. Cas. 11,126.

26. If, by wilfully making a false schedule or affidavits, the bankrupt prevents notice to a creditor, his discharge may be annulled. *Rayl, Adm'r, v. Lapham*, 15 N. B. R. 508.

27. A debtor who obtains a discharge pending an action on his note which he omits from his schedule of liabilities, the plaintiff having no notice of proceedings in bankruptcy, cannot plead the discharge so obtained in bar. *Batchelder v. Low*, 8 N. B. R. 571.

28. The omission of the names of creditors in the schedule of a bankrupt with their knowledge and consent is not ground for

withholding a discharge. In re Needham, 2 N. B. R. 124; 1 Lowell, 809; 2 Amer. Law T. Rep. Bankr. 39; 16 Pittsb. Leg. J. 313; 1 Chi. Leg. News, 171; Fed. Cas. 10,081.

29. In opposition to discharge it was alleged that the bankrupt had had the beneficial interest in the property, in the management of which he appeared as the nominal agent. This property was not mentioned in his schedule of assets. *Held*, that as the bankrupt had not made a full disclosure, opposing creditors should not be compelled to specify their objections to his discharge, or be bound by such as they had specified, and case was recommitted to the register for further examination. In re Long, 3 N. B. R. 66; 7 Phila. 578; 26 Leg. Int. 849; Fed. Cas. 8,477.

30. If a banker wilfully omits from his schedule property in his possession and use, and books of account, and keeps them from the assignee, he is not entitled to a discharge. In re Beal, 2 N. B. R. 178; 1 Lowell, 323; 1 Chi. Leg. News, 326; Fed. Cas. 1,156.

31. The omission of a creditor's name from the schedule of indebtedness of a bankrupt is not sufficient ground for annulling a discharge, unless the omission is fraudulent. *Symonds v. Barnes*, 6 N. B. R. 377.

## V. AMENDMENT.

See AMENDMENT, III.

32. When amendments have been made to the schedule, the register should issue a warrant reciting the proceedings and commanding the marshal to serve upon the creditors, whose names have been introduced, notice of a meeting of creditors to prove their debts and choose an assignee. In re Perry, 1 N. B. R. 2; 1 Amer. Law T. Rep. Bankr. 4; Fed. Cas. 10,998.

33. A debtor was adjudicated a bankrupt and the warrant was issued for the first meeting of creditors. Thereafter it was shown by affidavit that the names of certain creditors had been omitted from the schedule. Amendment was permitted, but the register was directed to thereupon direct the marshal to issue a new warrant. *Id.*

34. Material additions to schedules are not allowable by amendment after the first meeting of creditors except to prevent injustice. In some cases the issue of an *alias* warrant is

required. In re Ratcliffe, 1 N. B. R. 98; 25 Leg. Int. 92; 6 Phila. 466; 15 Pittsb. Leg. J. 343; Fed. Cas. 11,578.

35. After the presentation of his schedule, the bankrupt made application for leave to amend to include another creditor. The register certified that this could be done without calling a new meeting of the creditors, and that the new creditor could petition the court for the appointment of a new assignee. The opinion of the register was concurred in by the court. In re Carson, 5 N. B. R. 200; 5 Ben. 277; Fed. Cas. 2,460.

36. When a bankrupt amends his schedule after an assignee has been chosen, so as to include an additional creditor for a considerable amount, it is not necessary to notify the creditors already named in such schedules before the amendment can take place, or to call a new meeting of creditors. *Id.*

37. A register may allow amendments to schedules on application of the bankrupt at any time the cause is pending before him, but it is better practice to issue an order to creditors to show cause. In re Heller, 5 N. B. R. 46; 41 How. Pr. 213; Fed. Cas. 6,339.

38. Specifications in opposition to discharge were not sustained, but the bankrupt had omitted one claim from his schedule. *Held*, that the schedule should be amended by inserting the claim. In re Preston, 3 N. B. R. 27; Fed. Cas. 11,392.

39. The bankrupt may, even after the consideration of specifications in opposition to discharge, amend his schedule by order of the court. *Id.*

## VI. VERIFICATION.

40. The act of June 22, 1874, amendatory of the thirty-ninth section (act of 1867), does not require the list of creditors filed to be verified, but, in the absence of any rule to that effect, it is proper to require such list to be verified. In re Hymes, 10 N. B. R. 433; 7 Ben. 427; Fed. Cas. 6,986.

41. The intent of the amendatory act of June 22, 1874, is that the list of creditors presented by the debtor in denial of the list presented by the creditors must be sworn to. In re Steinman, 10 N. B. R. 214; 6 Biss. 166; 6 Chi. Leg. News, 388; 31 Leg. Int. 269; 21 Pittsb. Leg. J. 200; Fed. Cas. 18,357.

## VII. FRAUD.

See 9, *ante*; CRIMES AND OFFENSES, 1.

42. A conveyance of lands for the purpose of protecting the same from sale for the benefit of creditors is valid as between the grantor and grantee and would pass to the assignee in bankruptcy, and a failure to include the same in the schedules constitutes a concealment thereof. *In re O'Bannon*, 2 N. B. R. 6; Fed. Cas. 10,894.

43. It does not constitute a fraudulent omission to omit individual liabilities from the schedule of a partnership's liabilities. *In re Pierson*, 10 N. B. R. 107; Fed. Cas. 11,153.

44. The fraudulent omission from his inventory of a portion of his assets by a bankrupt, contrary to the bankrupt law, may be prosecuted on information. *United States v. Block*, 15 N. B. R. 825; 4 Sawy. 211; 9 Chi. Leg. News, 234; Fed. Cas. 14,609; sec. 5182, R. S.

## VIII. IN GENERAL.

See COSTS AND FEES, 83.

45. A creditor is not prejudiced by a refusal of permission to take a copy of the inventory, so long as it was produced before the register and made accessible to the creditor for the purpose of examining it or the bankrupt. *In re Tift*, 18 N. B. R. 227; Fed. Cas. 14,033.

46. Where an assignee does not file his schedule of exempt property within twenty days, creditors are not limited to twenty days after it is filed within which to file exceptions (act of 1887). *In re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

47. The assignee of an involuntary bankrupt, who fails to include a certain claim in his schedule of assets, cannot be held to have elected to abandon it in the absence of any evidence of his knowledge or sufficient means of knowledge of its existence. *Dushane v. Bevel*, 161 U. S. 513.

48. A bankrupt's schedule cannot be objected to because it does not include property, his interest in which either as lessee or as husband has been sold by creditors upon execution. *In re Pomeroy*, 2 N. B. R. 3; Fed. Cas. 11,258.

## SEAL.

See NOTARY PUBLIC, IV.

## SECURED CLAIMS.

## I. IN GENERAL.

## II. BY MORTGAGE.

## III. WHEN NOT.

## IV. PROOF OF.

(a) *In General*.

(b) *By Mortgagee*.

(c) *Not Provable*.

(d) *Security Waived*.

(e) *Security Not Waived*.

(f) *Withdrawal of Proof*.

(g) *Without Valuation*.

## V. SALE OF SECURITY.

## VI. WAIVER OF SECURITY.

See BANKS, IV; CLAIMS, 49, 57, 59, 75, 240; COMMERCIAL PAPER, 32; COMPOSITION, 63, 64, 158, IV, (c); COURTS, 239, 250; ESTATES, 271; PETITIONS, 76; PREFERENCES, 106, 173, 235, 238; SET-OFF, 37; TRUSTEE, 54; USURY, 8.

## I. IN GENERAL.

1. Advances made on the faith of a security presently to be given will be protected, notwithstanding changes in the condition of the borrower pending the consummation of the agreement, by actual delivery of the security. *Sparhawk et al., Ass., v. Richards & Thompson*, 12 N. B. R. 74; 1 Wkly. Notes Cas. 510; Fed. Cas. 13,205.

2. A creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor. *Lewis, Trustee, v. United States*, 14 N. B. R. 64; 23 U. S. 618.

3. Until the debt or liability of a pledge creditor is discharged, he cannot be compelled to surrender his security. *In re Buse*, 8 N. B. R. 52; Fed. Cas. 2,221.

4. Where there are several creditors having a common debtor, who has several funds, all of which can be reached by one creditor, and only part by the others, the former takes payment out of the fund to which he can resort exclusively, so that all may be paid. *In re Sauthoff & Olson*, 14 N. B. R. 364; 7 Biss. 167; 5 Amer. Law Rec. 173; 8 Chi. Leg. News, 370; 3 Cent. Law J. 554; 8 N. Y. Wkly. Dig. 96; Fed. Cas. 12,879.

5. One creditor may not take part of the fund which otherwise would have been avail-

able for the payment of all creditors, and at the same time be allowed to come in *pari passu* with other creditors, for satisfaction out of the remainder of the funds; this principle does not apply when that creditor obtains by his diligence something which did not and could not form part of the fund. In re Bugbee, 9 N. B. R. 258; Fed. Cas. 2,115.

6. No proceedings in bankruptcy can deprive creditors of their just possession of property held as security for a debt without discharging the debt. Davis et al. v. Railroad Co. et al., 13 N. B. R. 258; 1 Woods, 661; Fed. Cas. 3,648.

7. A secured creditor may vote for assignee on so much of his debt as is unsecured, where the security applies only to a specific portion of his debt. In re Parkes and Parkes, 10 N. B. R. 82; Fed. Cas. 10,754.

8. Creditors who are fully secured need not be reckoned in computing the proportion who must join in a composition. In re Van Auken & Crane, 14 N. B. R. 425; Fed. Cas. 16,823.

9. A judgment creditor cannot claim the jurisdiction of the bankrupt court for the collection of his debt fully secured by the only lien on real estate. In re Avery v. Johann, 3 N. B. R. 36; 2 Amer. Law T. Rep. Bankr. 92; 4 N. B. R. 143; 1 Chi. Leg. News, 261; Fed. Cas. 675.

10. Where, on the loan of money, an incomplete security is received, as by confession of judgment, the lender cannot, upon afterward learning of his debtor's insolvency, perfect his security by entering the confession of record. Clark v. Iselin, 9 N. B. R. 19; 10 Blatchf. 204; 21 Pittsb. Leg. J. 82; Fed. Cas. 2,825.

11. Security given by an insolvent out of the ordinary course of business cannot be held valid simply because the debtor voluntarily gave it without consulting with the creditor either as to security or as to the debtor's condition. Graham v. Stark et al., 8 N. B. R. (8 vo. ed.) 357; 3 Ben. 520; 2 Chi. Leg. News, 73; Fed. Cas. 5,676.

12. A conveyance, even though fraudulent, is not made "in contemplation of bankruptcy or insolvency," where there are no other creditors, and the debt is well secured. In re Johann, 4 N. B. R. 143; 2 Biss. 139; Fed. Cas. 7,331.

## II. BY MORTGAGE.

### See MORTGAGES.

13. A debtor filed his petition and enumerated in his schedule as a creditor holding security, E, from whom he had, with another, purchased land, giving in payment promissory notes on which there were sureties, to secure whom a deed of trust was made by the debtor and his joint purchaser to C, the deed providing that if any note were not paid the land should be sold and the proceeds given to E. One note was not paid and constituted the debt specified. The court held E. to be a secured creditor and directed the sale of the property by the assignee. In re Stewart, 1 N. B. R. 42; 1 Amer. Law T. Rep. Bankr. 16; 15 Pittsb. Leg. J. 222; Fed. Cas. 13,418.

14. Security for the payment of a note, by way of a deed of trust, given on the property of the wife of a bankrupt, by the husband and wife jointly, is security within the meaning of the bankrupt act of 1867, and such claim should be allowed as a secured demand, although the wife may have died leaving heirs, and the court will, on proper motion, attend to the application of the security and to the interests of the assignees. In re Hartel, 7 N. B. R. 559; Fed. Cas. 6,157.

15. A creditor, whose claim consists of notes and drafts, for which he has no security, and also of a debt secured by mortgages, can be admitted as a creditor only for that part of his claim which is unsecured, and the indebtedness for which he has security must rest in abeyance until the value of the securities be ascertained in the manner provided in the twentieth section of the bankrupt act of 1867. In re Hanna, 7 N. B. R. 502; 5 Ben. 5; Fed. Cas. 6,027.

16. A mortgage given by a debtor before becoming insolvent and not in contemplation of bankruptcy, to secure a creditor, although with intent to prefer, is valid. Dunham v. Orr, 2 N. B. R. (8 vo. ed.) 17; 2 Ben. 488; Fed. Cas. 4,143.

17. Although a security by mortgage be out of the usual course of business, yet, unless the creditor knew of the insolvency or had reasonable cause to infer it, the security will be valid, although the debtor was insolvent at the time of giving it. Lee v.

Franklin Ave. G. S. Inst., 3 N. B. R. (8 vo. ed.) 218; 1 Chi. Leg. News, 370; Fed. Cas. 8,188.

18. A security by way of mortgage given more than four months before bankruptcy will be protected, although a change in the former substance of the deeds be made within four months of bankruptcy, if no greater value be put into the creditor's hands than he had before. *Sawyer et al. v. Turpin et al.*, 5 N. B. R. 339; 2 Lowell, 29; Fed. Cas. 12,410.

19. A debt, either wholly or in part secured by levy under execution, by pledge of personal property, or by mortgage upon real estate, will sustain a petition in bankruptcy. *In re Stansell*, 6 N. B. R. 183; Fed. Cas. 13,293.

20. Where a creditor, knowing his debtor's insolvency, takes a mortgage to secure a pre-existing debt, and also a credit given at the time of the execution of the mortgage, the latter, being void as to the debt, is void *in toto*. *Tuttle v. Truax*, 1 N. B. R. (8 vo. ed.) 601; Fed. Cas. 14,277.

### III. WHEN NOT.

21. The fact that sureties on a bond are indemnified by a mortgage does not render a claim on the bond a secured claim. *In re Lloyd*, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 298; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429.

22. An involuntary petition in bankruptcy was filed. Attaching creditors denied that the requisite number had joined, and alleged that an indorsed note was a secured claim and could not be counted. *Held*, that it was not a secured claim. *In re Broich et al.*, 15 N. B. R. 11; 7 Biss. 303; Fed. Cas. 1,921.

23. A creditor seizing property by attachment issued from a state court, within four months prior to the beginning of bankruptcy proceedings, is not a secured creditor within the meaning of section 5075, Revised Statutes. *Id.*

### IV. PROOF OF.

#### (a) *In General.*

24. A creditor holding a claim wholly or partially secured may prove it in bankruptcy, although he may not vote for assignee. *In re Davis & Son*, 1 N. B. R. (8 vo. ed.) 120; 7 Amer. Law Reg. (N. S.) 30; 15 Pittsb. Leg. J. 103; Fed. Cas. 8,614.

25. The security that must be liquidated, before the creditor can prove his debt in bankruptcy proceedings, must be upon property, real or personal, of the bankrupt that may be surrendered to the assignee. A claim secured by the guaranty of a third person may be proved as if unsecured. *In re Anderson*, 12 N. B. R. 502; 7 Biss. 233; Fed. Cas. 350.

26. It is necessary for the creditor, whose debt is secured by lien, to prove or liquidate his debt as secured, that the court may be fully informed how to dispose of the assets so as to do equity between all the creditors. *In re Winn*, 1 N. B. R. 131; 1 Amer. Law T. Rep. Bankr. 17; Fed. Cas. 17,876.

27. A secured debt is provable, within the meaning of section 39 of the bankrupt act of 1867, so as to entitle a creditor holding such debt to file a petition for adjudication of bankruptcy under said section. *In re Bloss*, 4 N. B. R. 37; Fed. Cas. 1,562.

28. A creditor holding a debt against a bankrupt, whose liability arises by his accommodation indorsement of bills of exchange, to secure the payment of which the drawers and acceptors have given collateral security, may prove his debt as if unsecured. *In re Dunkerson & Co.*, 12 N. B. R. 413; 4 Biss. 253; Fed. Cas. 4,157.

29. A creditor holding security for his debt does not prejudice his claim by proving his debt as one with security, and setting out, in his proof, the particulars of the security and its estimated value, such proof being prerequisite to any action for the appropriation of the security, in satisfaction, in whole or in part, of the debt. *In re Grinnell & Co.*, 9 N. B. R. 29; 7 Ben. 42; 21 Pittsb. Leg. J. 82; Fed. Cas. 5,830.

30. A surety is entitled to prove against the estate of his bankrupt principal, and receive dividends on the whole amount which he is required to pay as surety, without deducting any security held by him or the proceeds thereof. *Jervis v. Smith*, 3 N. B. R. 147.

31. Where under state laws the landlord has a lien for rent, the same will be upheld in a bankruptcy court, and the assignee must take title subject thereto. The landlord may prove his claim for the unexpired term of a lease beyond one year, even though he has been preferred under a state law, for his rent to the end of the year. *In re Wynne*, 4 N. B.



R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

32. A creditor holding collateral security is entitled to have his claim referred to the register for investigation, and the assignee is not justified in rejecting it until proofs have been taken and the matter fully inquired into. In re Nounnan & Co., 6 N. B. R. 579.

### (b) *By Mortgagee.*

33. A creditor proposed to prove a debt against a bankrupt, which was secured by a mortgage upon real and personal property. Held, that he might prove his claim, upon making oath to the amount due him and the securities held therefor. In re Bridgman, 1 N. B. R. 59; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 1,866.

34. A mortgagee applied to the bankrupt court for leave to foreclose his mortgage in another court. Held, that before so doing he must prove his debt in the bankrupt court as a secured claim. In re Sabin, 9 N. B. R. 333; Fed. Cas. 12,193; In re Frizelle, 5 N. B. R. 122; Fed. Cas. 5,133; McHenry et al. v. La Societe Francaise, 16 N. B. R. 385; 95 U.S. 58.

35. The liability of a bankrupt as indorser on promissory notes having become absolute, a creditor holding a mortgage of property from the maker thereof as security for their payment may prove the full amount of the notes against the bankrupt as indorser. In re Cram, 1 N. B. R. 132; 1 Hask. 89; 1 Amer. Law T. Rep. Bankr. 65, 120; Fed. Cas. 3,343.

36. A, as receiver of B, offered as proof of debt against the bankrupt's estate a deposition setting forth loans of money, payment being secured by bonds, the payment of the bonds being secured by mortgage on property of the bankrupt, and which the claimant offered to prove as a secured claim. The proof contained no averment as to the consideration for the obligation of the bankrupt as set forth in the bonds. Held, that the receiver should be admitted as a secured creditor without stating the consideration. In re Lake Superior Ship Canal, Railroad and Iron Co., 10 N. B. R. 76; Fed. Cas. 7,998.

### (c) *Not Provable.*

37. When a creditor secured by a mortgage elects to pursue the mortgaged premises, he

deprives himself of all right to prove his debt in bankruptcy for any deficiency. In re Iron M. Co., 4 N. B. R. (8 vo. ed.) 645; 9 Blatchf. 320; Fed. Cas. 7,065.

38. Secured creditors cannot be reckoned as having provable debts within amended section 39 of the bankrupt act of 1867. In re Crossette et al., 17 N. B. R. 208; Fed. Cas. 8,435.

### (d) *Security Waived.*

See WAIVER, I, (b).

39. If a creditor prove his full claim without reference to his lien or security, and without apprising the bankrupt court of its existence, such an act is a waiver of the lien and a relinquishment of the security to the assignee. Stewart v. Isidor et al., 1 N. B. R. 129; In re Granger & Sabin, 8 N. B. R. 30; Fed. Cas. 5,684; In re McConnell, 9 N. B. R. 337; 10 Phila. 287; 31 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

40. The creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity, such securities being regarded as trusts for the better security of the debt; but if such creditor prove his debt as unsecured he waives his lien. In re Jaycox & Green, 8 N. B. R. 241; Fed. Cas. 7,342.

41. Proof of debt as unsecured is *prima facie* an extinguishment of any security held for the same, and may ripen into a conclusive extinguishment. In re Parkes & Parkes, 10 N. B. R. 82; Fed. Cas. 10,754.

42. A judgment creditor proved his claim in bankruptcy, but, finding no assets to pay it, attempted to force payment by means of a *fi. fa.* Held, that by proving his claim he waived his judgment lien. Heard v. Jones, 15 N. B. R. 402.

43. A preferred creditor may prove his debt upon surrendering all property received as a preference. Scott v. McCarty, 4 N. B. R. (8 vo. ed.) 414; Fed. Cas. 12,518.

44. A mortgagee cannot prove his debt in bankruptcy unless he surrender the mortgaged property or agree as to its value with the assignee, so that he may prove for any excess of the debt over such value. High v. Hubbard, 8 N. B. R. (8 vo. ed.) 191; 2 Chl.

Leg. News, 9; 16 Pittsb. Leg. J. 193; Fed. Cas. 6,473.

45. When a security is given a creditor by the bankrupt, of his own property, the creditor may not prove his debt unless he surrenders the security, or it is sold with his consent, when he may prove for the residue of his debt which the security when sold does not discharge. When the security is of a third person, the creditor may prove without surrendering the security and may enforce it, provided he does not take from both sources more than the full amount of the debt. In re Cram, 1 N. B. R. 133; 1 Hask. 89; 1 Amer. Law T. Rep. Bankr. 65, 120; Fed. Cas. 3,343.

46. If a mortgage, pledge or lien be given by a principal debtor to secure his surety, and both become insolvent, the holders of the debts for which the surety is bound may have the property applied to the discharge of their debts specifically. But if the holder of the notes or other privileged debts prove against both estates, they waive their security. Or if through negligence of the creditors the security has been discharged, or if he has lost his lien, the creditors have no equity. They must apply their security so as to prove against either estate for the deficiency. Ex parte Morris, 16 N. B. R. 572; 2 Lowell, 424; Fed. Cas. 9,823.

#### (e) *Security Not Waived.*

47. A security is not waived by merely proving the second claim as a general claim. Hatch v. Seely, 13 N. B. R. 381.

48. A creditor who, in ignorance of his legal rights and in good faith, files proof of a claim secured by a deed of trust, will not be deemed to have waived his lien under such deed, especially if he be acting in a fiduciary capacity. In re Brand, 3 N. B. R. 85; 2 Hughes, 334; 2 Amer. Law T. Rep. Bankr. 66; Fed. Cas. 1,809.

49. A creditor having security may prove his claim to an amount exceeding the value thereof, without abandoning the same, but he is bound to set forth the value of the security, that he may vote as a creditor in respect to the overplus proven by him, upon the choice of the assignee. In re Bolton, 1 N. B. R. 83; 2 Ben. 189; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 1,614.

50. A secured creditor had his security appraised, proved his debt for the difference between the appraisal and his debt, and received a dividend. In an action on the security it was held he could recover. Streeper v. McKee, 17 N. B. R. 419.

51. A creditor whose debt is secured by a deed of trust upon property of the bankrupt may prove without surrendering his security, and if the proceeds of sale under the trust be insufficient to satisfy his demand, he will be for that deficiency a general creditor, to share *pro rata* in the distribution of the general assets. In re Ruehle, 2 N. B. R. 175; 2 Amer. Law T. Rep. Bankr. 59; 16 Pittsb. Leg. J. (O. S.) 5; 1 Chi. Leg. News, 186; Fed. Cas. 12,113.

52. A joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security. He may prove his whole claim against both estates and receive a dividend for each, but so as not to receive more than the full amount of his debt from both sources. In re Howard, Cole & Co., 4 N. B. R. 185; Fed. Cas. 6,750.

#### (f) *Withdrawal of Proof.*

53. Where proof is made by a creditor in ignorance of the security, and even when under a mistake in regard to the law in the case, he should be allowed to withdraw such proof, and then prove as a secured creditor, when no injury has resulted to the unsecured creditor by such improper proof. In re Jaycox & Green, 8 N. B. R. 241; Fed. Cas. 7,242.

54. Where a creditor makes proof of a claim and makes no mention of security held therefor, the proof being made through inadvertence, he should be given leave to withdraw the proof. In re Clark & Bininger, 5 N. B. R. 255; Fed. Cas. 2,806.

#### (g) *Without Valuation.*

55. Where the separate estate of a member of a firm is security for a firm debt, the firm creditor may prove the claim against the firm estate without valuation or surrender of his security, even though there are no debts against the separate estate. In re Thomas et al., 17 N. B. R. 54; 8 Biss. 139; 6 Cent. Law J. 151; Fed. Cas. 13,886.

56. If one partner pledges his property as security for a firm debt, the creditor may prove his full claim against the firm without a valuation of the securities. *Ex parte Whiting*, 14 N. B. R. 807; 2 Lowell, 472; Fed. Cas. 17,578.

57. Creditors can substantiate their claims against bankrupts, so as to comply with all the requirements of section 22 of the act of 1867, without previously ascertaining the value of securities which they hold. In *re Bigelow et al.*, 1 N. B. R. 186; 2 Ben. 490; 1 Amer. Law T. Rep. Bankr. 95; Fed. Cas. 1,396.

### V. SALE OF SECURITY.

58. If the debtor, though insolvent, acquiesce in a sale of stocks by a secured creditor, his assignee is bound by such acquiescence, although the stocks are sacrificed. *Sparhawk et al. v. Drexel et al.*, 12 N. B. R. 450; 1 Wkly. Notes Cas. 560; Fed. Cas. 18,204.

59. The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy. *Id.*

60. A secured creditor is entitled to a dividend only upon the balance of his claim after deducting the proceeds of his security. In *re Jaycox & Green*, 7 N. B. R. 303; 7 West. Jur. 18; Fed. Cas. 7,240.

61. A creditor holding security may be admitted as a creditor only for the balance of his claim after the sale of the security. In *re Snedaker*, 8 N. B. R. (8 vo. ed.) 629.

62. Where stock has been pledged to secure a call loan, the pledgee need not, upon the bankruptcy of the pledgor, obtain leave of court to sell the stock and pay the surplus into court. In *re Grinnell*, 9 N. B. R. 137; Fed. Cas. 5,829.

63. A secured creditor is entitled to apply the proceeds of his security to the payment of his debt and interest to the time of payment, when the contract provides that the principal shall bear interest until payment. In *re Haake*, 7 N. B. R. 61; 2 Sawy. 231; Fed. Cas. 5,883.

64. Under the bankrupt act a bank should prove its demand for a debt due as secured by stock, and by leave of court have it sold, the proceeds to be applied to the payment of the debt, and prove as a creditor of the estate for any balance that may remain. In

*re Morrison*, 10 N. B. R. 105; 6 Chi. Leg. News, 110; Fed. Cas. 9,889.

65. If a creditor having a firm note indorsed by one partner, and holding his property as security, obtain payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note. In *re Foot et al.*, 12 N. B. R. 337; 8 Ben. 228; 1 N. Y. Wkly. Dig. 76; Fed. Cas. 4,906.

66. After the holder of a note signed by the bankrupt had made proof in full against the estate, an indorser who had been secured by the bankrupt paid the amount to the holder and disposed of the security. *Held*, that he should give credit for the amount realized from his security and take a dividend upon the excess only of the original debt as proved. In *re Baldwin*, 19 N. B. R. 52; 8 Cent. Law J. 186; Fed. Cas. 796.

67. A sale made by a creditor secured by deed of trust, after commencement of proceedings in bankruptcy, without permission of the bankrupt court, will be set aside. *Smith v. Kehr*, 7 N. B. R. 97; 2 Dill 50; 6 West. Jur. 451; Fed. Cas. 13,071.

68. The value of a security cannot be ascertained by the creditors sending it to an auctioneer and having it advertised and sold at auction. In *re Hunt*, 17 N. B. R. 205; 35 Leg. Int. 71; Fed. Cas. 6,884.

69. The court has authority to inquire into and determine the value of securities held by creditors of an alleged bankrupt, in order to ascertain whether the claims of the petitioning creditors are of the amount required by law. In *re Cal. Pac. R. R. Co.*, 11 N. B. R. 193; 8 Sawy. 240; 2 Cent. Law J. 79; Fed. Cas. 2,315.

### VI. WAIVER OF SECURITY.

70. Secured creditors may file a petition in involuntary bankruptcy, and such act is a waiver of the security or relinquishment of the lien. In *re Broich et al.*, 15 N. B. R. 11; 7 Biss. 303; Fed. Cas. 1,921.

71. A creditor fully secured may file a petition in bankruptcy without expressly waiving his preference therein, but the better practice is to do so. In *re Stansell*, 6 N. B. R. 183; Fed. Cas. 18,293.

72. A creditor who has a lien upon the property of his debtor, by virtue of a judgment, execution and levy, or as secured by garnishment, filing a petition for adjudication of bankruptcy without reference to such lien or security, thereby waives the same, and stands as an unsecured creditor. In re Bloss, 4 N. B. R. 37; Fed. Cas. 1,562.

73. Subsequent to the filing of the petition a secured creditor may waive his security and join, thus securing all the rights of an unsecured creditor. In re Crossette et al, 17 N. B. R. 208; Fed. Cas. 3,435.

74. A creditor instituted proceedings to have debtors adjudicated bankrupts. The debtors filed a petition for composition, and a meeting was ordered to consider it. Certain attaching creditors appeared at this meeting. *Held*, that they had no such right, unless they should first relinquish their security. In re Scott, Collins & Co., 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

75. If a creditor is secured by a lien upon the property of the bankrupt, he may either release the lien and unite in the composition for his whole debt, or have his security valued and come in for the difference. The "Home," 18 N. B. R. 557; Fed. Cas. 6,657.

### SEDUCTION.

A judgment for damages recovered by a father for the seduction of a daughter is not a debt created by fraud within the meaning of the bankruptcy act, where there is no promise of marriage, nor arts or devices practiced which can in law amount to legal fraud on the father. Howland v. Carson, 16 N. B. R. 372.

### SEIZURE.

See MARSHAL, 3, 4, 8-12; PLEADING AND PRACTICE, 94, 124; STAY, ETC., 25.

### SERVANTS.

See OPERATIVES; WAGES.

### SERVICE.

See PLEADING AND PRACTICE, XV, (h).

### SET-OFF.

#### I. ESTATE.

(a) *In General*.

(b) *Bank*.

#### II. CREDITOR.

#### III. DEBTS NOT PROVABLE.

(a) *In General*.

(b) *Purchased Before Filing Petition*.

(c) *After Filing Petition*.

#### IV. WIFE.

#### V. TRUSTEE (ASSIGNEE).

#### VI. IN GENERAL.

See PETITIONS, 35; STOCKHOLDERS, 32.

#### I. ESTATE.

(a) *In General*.

1. A claim against the bankrupt before his bankruptcy cannot be set off against an indebtedness of goods purchased from the assignee, but a claim against the bankrupt's estate may be set off against an indebtedness for goods purchased from the assignee. Moran et al. v. Bogert, 14 N. B. R. 393.

2. A stockholder, who was indebted to an insolvent corporation for unpaid shares, which had only been nominally paid, the money being immediately taken back as a loan, filed his bill to have set off a debt due him by the corporation. *Held*, that such unpaid subscription was a trust fund for the benefit of all creditors and could not be set off. Sawyer et al. v. Hoag et al., 9 N. B. R. 145; 17 Wall. 610.

3. A firm, which afterward became bankrupt, borrowed money for which they gave a joint and several note, which was paid by a co-surety before the bankruptcy, but after the failure of the firm. The co-surety lent other money to the firm, for which collateral was taken. This other debt was unpaid at the time of the bankruptcy. The proceeds of the collateral more than equaled the second debt. Petition was brought to have the proceeds applied on the first debt. The petition was granted. Whiting, Ex parte, In re Dow et al., 14 N. B. R. 307; 2 Lowell, 473; Fed. Cas. 17,573.

(b) *Bank*.

See BANKS, VI.

4. A bankrupt who is liable to a bank for notes, on some of which he is principal and others is indorser, may set off an amount on

deposit to his credit, against his debt to the bank, not including any notes upon which he is surety, unless the principals are insolvent. *In re North et al.*, 16 N. B. R. 420; 2 Lowell, 487; Fed. Cas. 6,764.

5. Where a creditor, a bank, collects money due the bankrupt and gives the same to the sheriff, who applies it on the bank's judgment, the set-off does not arise; but it is a fraudulent preference, and the money can be recovered. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

6. The assignees of an insolvent bank sued the maker of a promissory note held by the bank. The maker of the note, after the recording of the deed of assignment to the plaintiffs, and with knowledge of the insolvency of the bank and of the assignment, took a transfer of a draft issued by the bank which had been protested. This draft he sought to set off against the claim of the assignees on his note. *Held*, that the defendant was entitled to the set-off. *Shryock et al., Ass., v. Bashore*, 13 N. B. R. 481; Fed. Cas. 12,820.

7. A bank has the right, under the bankrupt law, to set off the amount of a protested draft against the deposit of an insolvent debtor. *In re Petrie et al.*, 7 N. B. R. 332; 5 Ben. 110; Fed. Cas. 11,040.

8. Where there is a conditional transfer of a draft to the debtor of a bank which drew the draft, the debtor cannot set off such draft against a note made by him to the bank. *Shryock et al., Ass., v. Bashore*, 15 N. B. R. 283-287.

9. A depositor in a bank which has made a voluntary assignment may set off a balance to his credit against his note held by the bank at the time of assignment. *City Bank v. Sherlock*, 16 N. B. R. 62.

10. Plaintiff tendered to the assignee of an insolvent bank, in payment of a judgment against himself, a protested draft drawn by defendant bank on a second bank in favor of a third bank, and indorsed to plaintiff. *Held*, that the assignee could not accept the protested draft in payment. *Bashore et al. v. Rhoads et al.*, 16 N. B. R. 72.

## II. CREDITOR.

See CLAIMS, 277; PREFERENCES, 216.

11. Assignee in bankruptcy brought action to foreclose mortgage given by K. K. pleaded as a set-off amount due him from

bankrupt for personal services. *Held*, that K. could set off any demand in his favor which is the subject of set-off. *Von Sachs, Ass. etc., v. Kretz et al.*, 19 N. B. R. 83.

12. Assignee in bankruptcy brought action against K. to foreclose mortgage. K. pleaded as a set-off amount due him from bankrupts, and offered admissions of bankrupts before bankruptcy. *Held*, that such evidence was admissible. *Id.*

13. Previous to commencement of proceedings, the bankrupt firm had been under the management of its creditors, and A. acted as their agent in the sale of its products. Prior to the arrangement with its firm's creditors it owed A., but at the time the petition was filed A. owed the firm under the new arrangement, according to which he was to handle the goods as a special account, and in settlement turn over the cash received. *Held*, that A. could not set off his old account against his debt arising under the new agreement. *In re Troy Woolen Co.*, 8 N. B. R. 412; Fed. Cas. 14,203.

14. In making proof of claim, a creditor did not show that the bankrupt held an unsatisfied claim against him. Assignee brought suit on the claim, and he pleaded the amount allowed on his proof as a set-off. *Held*, that he was not entitled to such set-off. *Russell, Ass. etc., v. Owen*, 15 N. B. R. 322.

15. Where creditors of an insolvent corporation are also stockholders, they will not be permitted to deduct their claims from their proportions of the unpaid capital, yet, if their debts are proved, deductions may be made, perhaps, from the assignee's demands, equal to their estimated dividends. *Wilbur, Ass., v. Stockholders*, 18 N. B. R. 178; 13 Phila. 479; 35 Leg. Int. 346; 26 Pittsb. Leg. J. 15; Fed. Cas. 17,636.

16. Against the principal of a debt due a creditor, nothing can be set off except a debt due to the bankrupt from the creditor. *In re Purcell*, 18 N. B. R. 447; Fed. Cas. 11,470.

17. Where an employee was in the habit of paying out money for his employer, the employee may set off such money as may be in his hands at the time of the bankruptcy of his employer against his salary due. *Ex parte Pollard, In re Elliot Felt Mills*, 17 N. B. R. 228; 2 Lowell, 411; Fed. Cas. 11,252.

18. A creditor who at the time of the bankruptcy has in his possession goods of the bankrupt with a power of sale, or choses

in action with a power of collection, may sell the goods or collect the claims and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect would have been revocable by the bankrupt before his bankruptcy. In re Dow et al., 14 N. B. R. 301; 2 Lowell, 472; Fed. Cas. 17,573.

19. A promise to return collateral upon payment of a debt does not bar a set-off, unless the property has been intrusted to the agent for a purpose inconsistent with such an application of the surplus, so that this would be a breach of trust. *Id.*

20. A person holding stock of the bankrupt as collateral for a debt overdue at the commencement of proceedings may, if he has power to sell the stock, retain the surplus by way of set-off on another claim. *Id.*

21. The holder of a note advanced by a factor to a manufacturer and by him discounted, who has agreed to a composition with the factor receiving his right to prove the amount of the note against the other parties to it, need not, in proving against the manufacturer, give credit for the full amount received by him on composition, but must abate his proof by giving credit for the manufacturer's goods in possession of the factor at the time of his bankruptcy. *Ex parte Harris et al.*, In re Cochrane, Jr., 16 N. B. R. 432; 2 Lowell, 568; Fed. Cas. 6,109.

22. Plaintiff was a stockholder, policyholder and treasurer of a fire insurance company. At the time of the bankruptcy of the company he was indebted for subscriptions on stock, and had in his hands funds which he held as treasurer. He also had a claim against the company for loss sustained by fire. *Held*, that he could not set off his claim for loss against his subscriptions for stock, nor against the amount due from him as treasurer. *Scammon v. Kimball*, 8 N. B. R. 337; 5 Biss. 431; 18 Int. Rev. Rec. 118; 4 Chi. Leg. News, 284; 2 Ins. Law J. 775; Fed. Cas. 12,435.

### III. DEBTS NOT PROVABLE.

#### (a) *In General.*

23. Where a note is subject to set-off for an amount greater than the note it is not a provable debt. In re Ford et al., 18 N. B. R. 426; Fed. Cas. 4,932.

#### (b) *Purchased Before Filing.*

See CLAIMS, 274, 275.

24. A debtor suspecting that his creditor was about to become bankrupt purchased the debt of a creditor of his creditor. Upon proceedings in bankruptcy being had he attempted to set off this claim against his debt. *Held*, offset claimed should be allowed. In re City Bank, etc., 6 N. B. R. 71; 4 Chi. Leg. News, 81; 6 West. Jur. 65; Fed. Cas. 2,742.

25. Upon an attempted set-off of a debt due before bankruptcy and one not due till afterwards, both being due at the time of the attempted set-off, *held*, these accounts mutual and can be set off against each other. *Id.*

#### (c) *After Filing Petition.*

See CLAIMS, 276.

26. A bankrupt was formerly a banker. His assignee brought action to recover the balance due on a note which had been pledged with another bank as collateral. After the failure of the bank, claims of depositors were purchased by the defendants, which were assented to by the bankrupt. The claims were filed in set-off by the defendant. It was held they could not be allowed. *Rollins, Ass., v. Twitchell & Co.*, 14 N. B. R. 201; 2 Hask. 66; 5 Amer. Law Rec. 247; Fed. Cas. 12,027.

27. A chose in action which is not negotiable, and on which the assignee must sue in the name of the assignor, does not become a mutual debt or credit so as to be a matter of set-off. *Id.*

28. A debtor to a bankrupt's estate will not be aided by a court of equity to set off notes of the bankrupt, bought on a speculation of the probable dividends, against his debt. *Hunt v. Holmes et al.*, 16 N. B. R. 101; Fed. Cas. 6,890.

### IV. WIFE.

29. That a debt is contracted during coverture by a *feme covert*, who, though actually engaged in trade, has not complied with the requirements of the statutes, is available by her to defeat debts in bankruptcy proceedings. In re Slichter, 2 N. B. R. 107; Fed. Cas. 12,943.

30. A wife who deposits money with her

husband and receives portions thereof, leaving a balance due her at the time of her husband's adjudication, is entitled to prove such balance as a general creditor of her husband, and her debt may not be offset by the value of reasonable gifts from the husband, or of an insurance policy on his life for the benefit of the wife. *In re Bigelow et al.*, 2 N. B. R. 170; 3 Ben. 198; 2 Amer. Law T. Rep. Bankr. 87; Fed. Cas. 1,398.

### V. TRUSTEE (ASSIGNEE).

See COSTS AND FEES, 64; ESTATES, 145.

31. The bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed. *In re North et al.*, 16 N. B. R. 420; 2 Lowell, 487; Fed. Cas. 6,764.

32. Assignee under general assignment proceeded to dispose of assignor's property. Assignor was adjudged a bankrupt, and the assignee presented his claim for services, which was rejected. In an action by assignee to obtain possession of bankrupt's estate, *held*, that the assignee under the general assignment was entitled to set off the amount due him for services against the claim of the assignee in bankruptcy. *In re Catlin, Ass., v. Foster*, 3 N. B. R. 184; 1 Sawy. 37; 3 Amer. Law T. 134; 1 Amer. Law T. Rep. Bankr. 193; Fed. Cas. 2,519.

33. A debtor gave a creditor his accommodation notes for an amount greater than the debt, and the notes were discounted and afterwards proved against the debtor's estate in bankruptcy. *Held*, that an assignee could set off against the dividend due the creditor the dividend paid on the notes, and recover from the creditor the balance of the dividend paid. *In re Purcell*, 18 N. B. R. 447; Fed. Cas. 11,470.

34. The assignees sold certain live stock and thereafter brought action for the balance of purchase-money. The defendant sought to set off a bill for keep previous to the appointment of the assignees. This was not allowed, but the defendant was allowed for keep after the appointment. The register had determined the amount due for such keep without a hearing, and the determination was therefore set aside, unless the plaintiffs allowed a certain increased amount. *Moran et al. v. Bogert*, 14 N. B. R. 393.

### VI. IN GENERAL.

See CLAIMS, 278.

35. To constitute mutual demands, within the meaning of the bankrupt act, they should be due to and from the same persons in the same capacity. *Rollins, Ass., v. Twitchell & Co.*, 14 N. B. R. 201; 2 Hask. 66; 5 Amer. Law Rec. 247; Fed. Cas. 12,027.

36. Where the set-off is founded in a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper. *McCabe, Ass. etc., v. Winship*, 17 N. B. R. 118; Fed. Cas. 8,668.

37. Under the act of 1867 a creditor is not entitled to set off an unsecured account due to him from his debtor against moneys remitted to him by such debtor with directions to credit them on his mortgage debt and which he refused so to apply. To authorize a set-off there must be mutual credits or mutual debts. *Libby v. Hopkins*, 104 U. S. 303.

38. A claim for losses on policies of insurance may be set off against an indebtedness from the holder to the company for money deposited with him as a banker. *Scammon v. Kimball*, 13 N. B. R. 445; 92 U. S. 362.

### SETTLEMENTS.

See MARRIED WOMEN, 4, 5, 8, 12.

### SHERIFF.

I. LIABILITY OF.

II. IN GENERAL.

See ATTACHMENTS, 17; COSTS AND FEES, 24; INJUNCTION, 35; SALES, V, (d).

### I. LIABILITY OF.

1. Where property of a bankrupt is seized, sold, and the money turned over to the execution creditor by the sheriff, under judicial process, but within four months prior to bankruptcy proceedings, the money will have to be paid again by such officer to the assignee in bankruptcy, notwithstanding such first payment was made in ignorance of the bankruptcy proceedings. *Miller v. O'Brien*, 9 N. B. R. 26; 9 Blatchf. 270; 21 Pittsb. Leg. J. 82; Fed. Cas. 9,586.

2. A sheriff levying on the bankrupt's property after commencement of proceedings

and selling the same, paying over proceeds to execution creditor, with no actual notice that bankruptcy proceedings had ever been commenced, may still be compelled to account to the assignee, when appointed, for the proceeds of the goods so sold and paid over. *In re Grinnell & Co.*, 9 N. B. R. 29; 21 Pittsb. Leg. J. 82; 7 Ben. 42; Fed. Cas. 5,830.

3. Where a sheriff sold perishable goods under attachment by order of a state court, but without notice of the adjudication of the defendant in bankruptcy, he was guilty of the conversion of the goods, and is liable for the market value of the goods so converted. *Long, Ass. v. Conner*, 17 N. B. R. 540; Fed. Cas. 8,479.

4. Where a court reinstates a proceeding in bankruptcy, without notice to or appearance of debtor, the sheriff will not be protected by an order issued therein directing the payment of money to an assignee. *Gage et al. v. Gates*, 15 N. B. R. 145.

## II. IN GENERAL.

5. A sheriff will not be enjoined from an arrest of a bankrupt on execution pursuant to a judgment recovered on a debt created by fraud. *In re Patterson*, 1 N. B. R. 58; 2 Ben. 155; 15 Pittsb. Leg. J. 241; Fed. Cas. 10,817.

6. In many particulars, where it is not deemed a violation of his legal duty, a sheriff is deemed the agent of the plaintiff in the execution. *O'Brien v. Weld et al.*, 15 N. B. R. 405; 92 U. S. 81.

7. In Kentucky, after a *fi. fa.* is delivered to the sheriff, the creditor is not deprived of his lien by an act of bankruptcy on the part of the debtor, committed before the levy is made, but after the execution is in the hands of the sheriff. *Waller v. Best*, 3 How. 111.

## SPECIFICATIONS.

See DISCHARGE, II.

## STATE LAWS.

I. CONTRACTS UNDER.

II. ON INSOLVENCY.

III. STATE AS CREDITOR.

IV. IN GENERAL.

See LIEN, 27.

## I. CONTRACTS UNDER.

See CONTRACTS, VI.

1. If a debtor apply for the benefit of a state insolvent law, and the court dismiss the case for want of jurisdiction, this is a conclusive answer to an action on a bond conditioned to apply for the benefit of the state insolvent laws. *Hubert v. Horter*, 14 N. B. R. 430.

2. It was not the intent of congress to authorize national banks, in respect to interest, to violate the laws of the states within which they might be organized, nor to relieve them of the result of such violation prescribed by the state laws, if they were guilty thereof. *Receiver of Ocean Nat. Bank v. Estate of Wild*, 10 N. B. R. 568; Fed. Cas. 11,634.

## II. ON INSOLVENCY.

See ESTATES, 76.

3. Assignments under state insolvent laws are void. *Rowe v. Page*, 13 N. B. R. 366.

4. Although the law under which a state court undertook to distribute the assets of an insolvent corporation did not purport to discharge the debtor from its liabilities, *held*, attempted act of state court in contravention of bankruptcy law. *In re Merch. Ins. Co.*, 6 N. B. R. 43; 3 Biss. 162; 20 Pittsb. Leg. J. 82; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

5. The act of congress passed March 2, 1867, superseded the laws of insolvency of a state, even where the plaintiff and defendant are both citizens of the same state; hence, a discharge under the insolvent laws of a state is no defense to an action brought to recover an amount due on open account. *Casard et al. v. Kroner*, 4 N. B. R. 185.

6. The bankrupt act of 1867, so far as it operated to supersede state insolvency laws, did not take effect until June 1, 1867, and insolvency proceedings begun in a state court before that date may be continued after said act has become effective. *Martin v. Berry*, 2 N. B. R. 188.

7. When congress has exercised its power to establish bankruptcy laws, the insolvency laws of the states in conflict with the bankruptcy laws are superseded. Therefore, the fact that a state court has taken possession of property of an insolvent cannot be allowed



to defeat the execution of the bankrupt act. In re Safe Dep. and Sav. Inst., 7 N. B. R. 392; Fed. Cas. 12,211.

8. The common law relating to assignments for the benefit of creditors is not a part of the state (Michigan) insolvent law, and is not suspended by the national bankrupt law. Cook et al. v. Rogers, etc., 13 N. B. R. 97.

9. The adoption of a bankrupt law does not divest the state courts of jurisdiction over insolvent proceedings pending at the time of its adoption. Lavender v. Gosnell et al., 12 N. B. R. 282.

10. Where a bankrupt act is repealed the state insolvent laws are again in full force and need not be re-enacted. Id.

11. The general bankruptcy law suspends all proceedings under state insolvent laws. In re Mer. Ins. Co., 6 N. B. R. 43; 8 Biss. 162; 20 Pittsb. Leg. J. 32; 4 Chi. Leg. News, 73; Fed. Cas. 9,441.

12. The preference, after that of the United States, of the state in which the proceedings are pending, exists simply because of the act of congress, and if congress had not so enacted, or if it should enact otherwise, the preference would cease. The Six Penny Sav. Bank et al. v. The Estate of Stuyv. Bank, 10 N. B. R. 399; Fed. Cas. 12,919.

13. Where a question arose as to the validity of a state (Kentucky) law "to prevent fraudulent assignments in trust for creditors, and other fraudulent conveyances," held, that such a law was not an insolvent law, and therefore was not superseded by the federal bankrupt law. Ebersole et al. v. Adams, etc., 18 N. B. R. 141.

14. In all questions relating to real estate federal courts will follow the decisions of the courts of the state in which the land is situated. In re Zug et al., 16 N. B. R. 280; 23 Int. Rev. Rec. 392; 34 Leg. Int. 402; 25 Pittsb. Leg. J. 29; Fed. Cas. 18,222.

15. Except where the constitution or statutes of the United States otherwise provide, the supreme court adopts the local law of real property as ascertained by the decisions of the state court, whether those decisions are on the construction of the statutes or form part of the unwritten law of the state, which has become a fixed rule of property. Ray v. Brigham et al., 12 N. B. R. 145.

### III. STATE AS CREDITOR.

16. Where contractors were indebted to the state (New York) for services of convicts, and became bankrupt, held, that the state had a lien upon the machinery and tools of such contractor used upon the prison premises in operating the contract. In re Burt et al., 13 N. B. R. 137; 12 Blatchf. 252; Fed. Cas. 2,209.

17. A contract for the services of convicts is not void, so far as the state is concerned, although the contractor has failed to make deposit as the law requires. Id.

18. Where the preferred creditor was the state by virtue of a bond given to the people of the state, and the moneys were to be turned into the treasury of the city of New York, it was held that the state was the creditor. In re Chamberlin, 17 N. B. R. 50; 9 Ben. 149; Fed. Cas. 2,580.

19. A bankrupt's property was sold to a bona fide purchaser free from all incumbrances. Held, that the right of the state to taxes due thereon could not be divested. Stokes v. State of Georgia, 9 N. B. R. 191.

20. Bankrupt employed convicts from a state under contract by which state was to keep them under good discipline and at diligent labor for bankrupt. Held, that damage sustained by failure of state to perform these stipulations should be deducted from contract price in estimating amount due state. In re The Southwestern Car Co., 9 N. B. R. 404; 9 Biss. 76; Fed. Cas. 13,192.

21. A claim proved by A., as the warden of the state prison, for the purchase price of property belonging to the state, is entitled to priority. In re Miller et al., 17 N. B. R. 402; 26 Pittsb. Leg. J. 8; Fed. Cas. 9,554.

22. The state law as to exemptions having been changed during the year 1871, the exemption can be allowed only according to the law in force at the close of that year. In re Baer, 14 N. B. R. 97; Fed. Cas. 723.

### IV. IN GENERAL.

23. No state is bound to permit the operation of foreign laws when they are contrary to its policy or prejudicial to its interests. In re Bugbee, 9 N. B. R. 258; Fed. Cas. 2,115.

24. The state laws are not entirely superseded by the bankruptcy act, but where there

is a conflict the former remain in force. Gerry's Appeal, 17 N. B. R. 196.

25. A provision in the bankruptcy act adopting the exemption laws in the several states cannot make valid a state exemption law held unconstitutional by the supreme court of that state. *Bush v. Lester et al.*, 15 N. B. R. 36.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTORY CONSTRUCTION.

I. THE WHOLE MUST BE CONSIDERED.

II. NOT NEEDED WHEN THE MEANING IS PLAIN.

III. EFFECT.

(a) *When Prospective.*

(b) *When Retrospective.*

IV. OF AMENDATORY STATUTES.

V. OF PROHIBITORY STATUTES.

VI. OF STATUTES GIVING A REMEDY.

VII. REPEAL.

VIII. OF SPECIAL LAWS.

(a) *Bankrupt Act, 1867.*

(b) *Act of February 13, 1873.*

(c) *Revised Statutes.*

(d) *Act of June 22, 1874.*

IX. TIME.

X. IN GENERAL.

See CONSTITUTIONAL LAW, I, (c); COURTS, 96; PETITIONS, 69; STOCKHOLDER, 19.

I. THE WHOLE MUST BE CONSIDERED.

1. Where there is an inconsistency between the clauses of the bankrupt act, that one must yield, the non-enforcement of the provisions whereof to their full extent will least interfere with the part it is designed to take in carrying out the objects and purposes of the act taken as an entirety. *Hoyt et al. v. Freel et al.*, 4 N. B. R. 34.

2. It is a well settled rule that in putting a construction upon any part of a statute, the whole is to be considered, and effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent

and harmonious. *In re Scott & McCarty*, 4 N. B. R. 189; Fed. Cas. 12,518.

3. In order to give a uniform and harmonious interpretation to the bankrupt act, all the provisions contained therein must be considered in connection with each other, and the construction of any particular section determined with reference to all other sections. *Lamb v. Damron*, 7 N. B. R. 509; 5 Chi. Leg. News, 290; Fed. Cas. 8,014.

4. Sections 35 and 39 of the bankrupt act of 1867 must be construed together and made to harmonize. *Tyler, Ass., v. Brock et al.*, 17 N. B. R. 239.

5. Section 17 of the bankrupt act of 1874, providing for settlement of estates in bankruptcy by composition, is to be construed in harmony with the general principle pervading all bankrupt laws. *In re Jacobs*, 18 N. B. R. 48; Fed. Cas. 7,159.

II. NOT NEEDED WHEN THE MEANING IS CLEAR.

6. Where the language of a statute is transparent and its meaning clear, there is no room for the office of construction. *Lewis, Tr., v. United States*, 14 N. B. R. 64; 92 U. S. 618.

7. The courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. *In re Smith*, 14 N. B. R. 295; 2 Woods, 458; 2 N. Y. Wkly. Dig. 532; 8 Chi. Leg. News, 815; 3 Cent. Law J. 886; 3 Amer. Law T. Rep. (N. S.) 335; Fed. Cas. 12,996.

III. EFFECT.

(a) *When Prospective.*

8. The remedial provisions of the amendments to the bankrupt act, approved June 22, 1874, apply to all pending or future proceedings in causes commenced since December 1, 1873. *Barnett et al. v. Hightower and Butler*, 10 N. B. R. 157; Fed. Cas. 1,009.

9. It is the very essence of a new law that it shall apply to future cases; and such must be its construction unless the contrary plainly appears. *Brooke, Ass., v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

10. The new provision of section 14 of the

bankrupt act of 1874 was designed, where applicable, to apply to cases where there had been an adjudication and not to cases where there had been no adjudication. In re McKeon, 11 N. B. R. 182; 7 Ben. 513; 8 Amer. Law Rec. 611; 11 Alb. Law J. 7; Fed. Cas. 8,858.

11. A debtor who filed a petition was adjudicated bankrupt on the 22d of June, 1874. Afterward a creditor asked that the adjudication be set aside on the ground that requirements of the amended act of June 22, 1874, had not been fulfilled. *Held*, that the adjudication should be set aside. In re Carrier & Baum, 13 N. B. R. 208; 23 Pittsb. Leg. J. 57; Fed. Cas. 2,443.

12. Since the amendatory bankrupt act of June 22, 1874, the same number and amount of creditors must join in the proceedings to force a corporation into bankruptcy that is required in the case of an individual. In re Leavenworth Sav. Bank, 14 N. B. R. 82; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,166.

(b) *When Retrospective.*

13. Act of June 22, 1874, applying to cases commenced since December 1, 1873, was not meant as a retrospective act, and the adjudication of a case before its enactment into a law removed the case beyond legislative control. In re Raffauf, 10 N. B. R. 69; 6 Biss. 150; 6 Chi. Leg. News, 341; 21 Pittsb. Leg. J. 206; Fed. Cas. 11,525.

14. The amendment to bankrupt act of June 22, 1874, is retrospective and includes all cases commenced since December 1, 1873, in which there has been no adjudication, but does not annul or disturb judgments rendered or adjudications made and in force when amendment took effect. In re Obear, In re Thomas, 10 N. B. R. 151; 3 Dill. 37; 1 Cent. Law J. 362; Fed. Cas. 10,395.

15. B. was declared an involuntary bankrupt prior to June 22, 1874; certain creditors then prayed that proceedings be dismissed on ground that creditors did not include one-fourth in number and one-third in value. *Held*, amendatory act of June 22, 1874, does not apply to involuntary proceedings in which adjudication was had prior thereto, but only to involuntary proceedings commenced after December 1, 1873. Barnert et

al. v. Hightower & Butler, 10 N. B. R. 157; Fed. Cas. 1,009.

16. A. was adjudged a bankrupt on creditor's petition before passage of act approved June 22, 1874. On application for an order permitting one-fourth in number and one-third in value of the creditors to join, in compliance with section 39, *held*, that the decree of adjudication having been rendered prior to the approval of the amendatory act, it could not be affected thereby. In re Pickering, 10 N. B. R. 208; 1 Cent. Law J. 371; Fed. Cas. 11,120.

17. The act of June 22, 1874, is not retrospective in its effect and does not apply to cases adjudicated prior to its passage. In re Comstock & Co., 10 N. B. R. 451; 8 Sawy. 128; 6 Chi. Leg. News, 413; 23 Pittsb. Leg. J. 25; Fed. Cas. 3,077.

18. The amendments of June 22, 1874, to section 35 of the bankrupt act are not retroactive. Brooke, Ass. v. McCracken, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

19. The words of a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be attached to them, or unless the intent of the legislation cannot be otherwise satisfied. In re Perkins et al., 10 N. B. R. 529; 6 Biss. 185; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 185; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 48; Fed. Cas. 10,968.

20. Where an action is brought by trustees of a bankrupt's estate under section 39 of the act of 1867, to recover money paid by way of preference, the proceedings being involuntary, and having been commenced and the cause of action having arisen before December 1, 1873, the amendment of 1874, requiring proof that the creditor knew that the payment was in fraud of the act instead of that he must have had reasonable cause to believe, has no application. Van Dyke & Brownson v. Tinker, 11 N. B. R. 308; Fed. Cas. 16,849.

21. In cases of compulsory bankruptcy actually commenced, but not determined, before December 1, 1873, the amendments of 1874 do not apply. Singer, Ass. v. Sloan et al., 11 N. B. R. 433; 2 Cent. Law J. 141; Fed. Cas. 12,899.

22. Section 10 of the act of June 22, 1874,

changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect. *Bradbury, Ass., v. Galloway*, 12 N. B. R. 299; 3 Sawy. 346; 1 N. Y. Wkly. Dig. 84; Fed. Cas. 1,764.

23. Under the amendatory act of June 22, 1874, a case is controlled thereby in which conveyance was made before the passage thereof, provided there was no judicial passage on the conveyance previous to the amendment. *Boothe, Ass. etc., v. Brooks, Neeley & Co.*, 12 N. B. R. 398; 1 N. Y. Wkly. Dig. 125; Fed. Cas. 1,650.

24. An assignee in bankruptcy brought an action to recover back a preference in 1872, and while the suit was pending in 1874 the bankrupt act was amended. *Held*, that the rights of the parties must be determined in accordance with the bankrupt act before its amendment. *Slafter, Ass., v. Greer Turner Sugar Ref. Co.*, 13 N. B. R. 520.

25. The amendments of 1874, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act, and in reference to the proof of debts by creditors who have taken a preference, are not retroactive, and do not apply where the proceedings in bankruptcy had been previously commenced. Under the prior law a preferred creditor who did not surrender his preference until he was compelled to do so by the judgment of a court could not prove his debt. *In re Lee*, 14 N. B. R. 89; 23 Pittsb. Leg. J. 196; Fed. Cas. 8,179.

26. A trustee was appointed before the amendment of June, 1874, changing the law so as to require a creditor obtaining a preference to know the debtor to be insolvent, and he had a right to a certain sum of money held by the defendant, but did not commence his suit therefor until after the amendment. *Held*, that the amendment did not apply. *Tinker v. Van Dyke*, 14 N. B. R. 112; 1 Flip. 521; 8 Chi. Leg. News, 235; Fed. Cas. 14,058.

27. It is not necessary to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it shall come up to the test imposed by the amendatory act of June, 1874. The limitation of the retroaction of section 12

of the act of June, 1874, to the first day of December, 1873, excludes any other period for retroaction. *Oxford Iron Co. v. Slafter, Ass. etc.*, 14 N. B. R. 890; 13 Blatchf. 455; Fed. Cas. 10,637.

#### IV. OF AMENDATORY STATUTES.

28. When existing laws are amended by enactments that such a section shall read in an altered manner, and the altered section contains in part the old law and in part new provisions, the latter will be construed to relate to subsequent acts, and the former will be considered as having been the law from the time of its first enactment. *Oxford Iron Co. v. Slafter, Ass. etc.*, 14 N. B. R. 330; 13 Blatchf. 455; Fed. Cas. 10,637.

#### V. OF PROHIBITORY STATUTES.

29. An act may be unlawful as within the prohibition of a statute, and yet a debt or obligation growing out of the act be valid, unless it appears by a fair construction of the statute that it was the intention of the legislature that it should be void. *In re Moore*, 1 N. B. R. 123; 2 Bond, 170; 1 Amer. Law T. Rep. Bankr. 74; Fed. Cas. 10,041.

30. Unless it is clear from the words of a prohibitory statute that an agreement in violation of it is void, the courts will not so declare it, but will give effect to the agreement. The intention of the legislature is to be made out by referring to the whole statute, and such intention will control the courts in giving it a construction. *Id.*

#### VI. OF STATUTES GIVING A REMEDY.

31. An adequate remedy, providing for the enforcement of a new right conferred by act of congress, is not intended to be exclusive, such inference only being drawn where a new penalty is imposed. *Cook v. Waters et al.*, 9 N. B. R. 155.

32. A law which creates a liability between citizen and citizen, as further security for the contract of a corporation of which the obligated person is a member, has in it no penal element whatever, in that sense which makes a court refuse to enforce the penalties of foreign governments. *Tinker v.*

Van Dyke, 14 N. B. R. 112; 1 Flip. 521; 8 Chi. Leg. News, 235; Fed. Cas. 14,058.

33. The effect of the provisions of the act of 1874, section 2, is not to confer or take away jurisdiction of the state courts, but simply to allow the federal courts of original jurisdiction to decline to entertain actions at common law to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of those courts in other cases. *Goodrich v. Wilson*, 14 N. B. R. 555.

34. In an appeal to the supreme court of New York from a judgment recovered on the verdict of a jury for \$1,320 for goods conveyed in violation of the bankrupt act, *held*, that the act of June 22, 1874, gives the federal courts exclusive jurisdiction over actions brought by assignees to recover property transferred in violation of section 5128, Revised Statutes, where the value exceeds \$500. *Olcott, Ass. v. Maclean et al.*, 16 N. B. R. 79.

## VII. REPEAL.

35. One statute is not to be construed as a repeal of another if it be possible to reconcile the two together. In *re McConnell*, 9 N. B. R. 387; 10 Phila. 287; 81 Leg. Int. 61; 21 Pittsb. Leg. J. 107; Fed. Cas. 8,712.

36. The clause in section 5021, Revised Statutes, amending section 89 of the bankrupt law by inserting the word "knew," instead of the words "had reasonable cause to believe," is not to be applied to proceedings in bankruptcy commenced before December 1, 1873. When substantial rights are created by statute, or commercial contracts are regulated, the repeal of laws upon which they depend will not receive a retroactive application, unless the law expressly or by necessary implication so declares. *Tinker v. Van Dyke*, 14 N. B. R. 112; 1 Flip. 521; 8 Chi. Leg. News, 235; Fed. Cas. 14,058.

37. Those clauses of the bankrupt act of 1867 which authorize an assignee to recover the amount of unlawful preferences paid to particular creditors are not in their nature penal, and their repeal is not subject to the rule of construction applicable to the repeal of penal statutes. *Id.*

38. Where a right arises under or is given by a statute, and it has been so far perfected that nothing remains to be done by the party,

the repeal of the statute does not affect it, or an action for its enforcement. *Barnewall & Gaynor, Ass. v. Jones, Dunn & Crawford*, 14 N. B. R. 278; Fed. Cas. 1,027.

39. Where there is no express repeal of a law as it stood at the time of the amendment, the law will, in the absence of express provisions to the contrary, be deemed to apply and to govern the validity and consequences of acts done before it was amended. More especially must the rule be adhered to when the amendatory law contains express provisions fixing the period of its retroaction in certain specified cases, for this specification almost necessarily leads to the conclusion that in all other and unspecified cases the amendment is not to have a retroactive effect. *Oxford Iron Co. v. Slafter, Ass.*, 14 N. B. R. 880; 18 Blatchf. 455; Fed. Cas. 10,637.

40. Where a general clause of an amending law repeals all provisions of the original law inconsistent with those of the new law, it is in general construed to have the effect to substitute the new law for the old, retroactively as to penalties, forfeitures and disabilities. *Warren et al. v. Garber*, 15 N. B. R. 409; 1 Hughes, 365; Fed. Cas. 17,196.

41. Bankrupts applied for discharge, which was refused for the reason that under amendment of June 22, 1874, to the bankrupt law, they were restricted to assent of creditors whose claims originated after January 1, 1869. *Held*, that section 9, act of June 22, 1874, necessarily repealed proviso to section 5112, Revised Statutes. In *re Wheeler et al.*, 19 N. B. R. 258; 11 Chi. Leg. News, 407; 8 Reporter, 674; 4 Cin. Law Bul. 655; Fed. Cas. 17,491.

42. When a bankrupt act is repealed, the state insolvent laws are again in full force and need not be re-enacted. *Lavender v. Gosnell & Tripolett*, 12 N. B. R. 282.

43. The repeal of a statute, after a lien has been acquired under it, does not affect the lien. *Brooke, Ass. v. McCracken*, 10 N. B. R. 461; 7 Chi. Leg. News, 10; Fed. Cas. 1,932.

## VIII. OF SPECIAL LAWS.

### (a) *Bankrupt Act, 1867.*

44. By the term "fraudulent preference," used in item 9 of section 29 of the act of 1867, is meant only a preference in fraud of

the bankrupt act; that is, contrary to its provisions. In re Rosenfield, 1 N. B. R. 161; 7 Amer. Law Reg. (N. S.) 618; 1 Amer. Law T. Rep. Bankr. 81; Fed. Cas. 12,058.

45. The phrases "since the passage of this act" and "subsequently to the passage of this act" explained and distinguished. *Id.*

46. That no consequences can be allowed under section 21 to flow from proving a debt inconsistent with section 33 (act of 1867). In re Rosenberg, 2 N. B. R. 81.

47. The phrase "longest period" during each six months means longest period business was carried on in any district during such time, and not the greater portion of six months. *Foster v. Pratt*, 3 N. B. R. 57; 3 Ben. 386; Fed. Cas. 4,962.

48. Section 39 of the act of 1867 relates exclusively to proceedings in involuntary bankruptcy. In re Evans, 3 N. B. R. 62; Fed. Cas. 4,552.

49. The word "residence" in section 11 of the act of 1867 is not synonymous with "domicile." In re Watson, 4 N. B. R. 197; Fed. Cas. 17,272.

50. The bankrupt act must be uniform, and therefore, of two possible constructions, that which avoids constitutional objections must be preferred. *Ala. & Chatt. R. R. Co. v. Jones*, 5 N. B. R. 97; Fed. Cas. 126.

51. The latter clause of the forty-first section of the act of 1867 was intended to allow the debtor to disprove all the material allegations of the petition. In re Skelley, 5 N. B. R. 214; 3 Biss. 260; Fed. Cas. 12,921.

52. A railroad corporation is within the provisions of the thirty-seventh section of the bankrupt act of 1867. The word *business* as applied to corporations has a broader meaning than the word *commercial*, but congress did not intend to give it such scope as to supersede the words *monied* and *commercial*. *Sweatt v. Boston, H. & E. R. R.*, 5 N. B. R. 234; 3 Cliff. 339; 1 Amer. Law T. Rep. Bankr. 273; 6 Amer. Law Rev. 168; Fed. Cas. 13,684.

53. There is nothing in the language of the twenty-ninth section of said act which indicates an intention to confine the operations of its provisions to transactions occurring after the passage of the act. In re Cretiew, 5 N. B. R. 423; Fed. Cas. 3,390.

54. The first section of the bankrupt act of 1867 does not include, in the powers to be

exercised summarily, jurisdiction to foreclose a mortgage upon bankrupt's estate. In re Casey, 8 N. B. R. 71; 10 Blatchf. 376; Fed. Cas. 2,495.

55. The fourteenth and thirty-fourth sections of the bankrupt act of 1867 construed. *United States v. Throckmorton et al.*, 2 N. B. R. 309; 18 Int. Rev. Rec. 54; Fed. Cas. 16,516.

56. That part of section 41 of the bankrupt act of 1867 providing when jury trial shall be held does not prevent ordinary special jury when circumstances require. In re Hawkeye Smelting Co., 8 N. B. R. 385.

57. National banks are not included under section 37 of the bankrupt act of 1867, congress having made special legislation as to them. *Smith v. Mfrs. Nat. Bank*, 9 N. B. R. 122; Fed. Cas. 13,076.

58. It is the intention of section 43 of the act of 1867 that, pending proceedings under it, all the ordinary processes and proceedings under the act, for the time being, are absolutely superseded and suspended, excepting so far as such processes and proceedings are retained by the express words or by the necessary implication of the provisions of such section. In re Trowbridge, 9 N. B. R. 274; Fed. Cas. 14,191.

59. Section 12 of the bankrupt law of 1867, which declares that no creditor proving his claim shall be allowed to maintain any suit therefor at law or equity against the bankrupt, cannot have any broader scope than is warranted by the letter of the statute. It does not inhibit collateral remedies. The right of action against a party as a stockholder of a corporation is not affected by the bankrupt law. *Allen v. Ward*, 10 N. B. R. 335.

60. Section 38 of the bankrupt act construed to mean the filing of a petition sustained by proof of the acts of bankruptcy and of the claim of the petitioning creditor (1867). In re Rogers, 10 N. B. R. 444; 1 Cent. Law J. 470; Fed. Cas. 12,003.

61. Section 2 of the bankrupt act applies only to cases where suit is brought in regard to property held adversely to the bankrupt and the assignee, or to cases (as amended in 1874) where suit is brought to recover any debt that may be due the bankrupt. *Pickett, Ass. v. McGaviok*, 14 N. B. R. 236; 3 Cent. Law J. 303; 13 Alb. Law J. 218, 400; 2 N. Y. Wkly. Dig. 378; Fed. Cas. 11,126.

62. The language employed in the first

clause of section 35 of the act of 1867 imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. The second clause must be limited to cases where the transaction was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. *Barnewall & Gaynor, Ass., v. Jones, Dunn & Crawford*, 14 N. B. R. 278; Fed. Cas. 1,027.

63. Technical trusts, and not those which the law implies from the contract, are embraced by section 33 of the bankrupt act (1867), while acting in any fiduciary character. *Keime v. Graff et al.*, 17 N. B. R. 319; 5 Rep. 489; 25 Pittsb. Leg. J. 118; Fed. Cas. 7,650.

64. The clause of section 44 of the bankrupt act (1867) which punishes by imprisonment any fraudulent disposition of property, obtained on credit and unpaid for, within three months before bankruptcy proceedings, is constitutional and valid. *United States v. Pusey*, 6 N. B. R. 284; Fed. Cas. 16,098.

(b) *Act of February 13, 1873.*

65. The act of February 13, 1873, applies only to such orders relating to the ratable distribution or payment of dividends as the state courts may have passed prior to the commencement of proceedings in the district court, or prior to its adjudication in bankruptcy, for the ratable distribution or payment of dividends. *Watson v. Citizens' Sav. B. of S. C.*, 11 N. B. R. 161; 2 Hughes, 200; Fed. Cas. 17,279.

(c) *Revised Statutes.*

66. The limitation contained in section 5057 of the Revised Statutes applies only where adverse interests in property are involved or where the cause of action has accrued after bankruptcy. *Latting v. Fassman et al.*, 17 N. B. R. 183.

67. Section 5021 of the Revised Statutes, in relation to proof of debt, applies also to cases begun prior to December 1, 1873. In *re Black et al.*, 17 N. B. R. 399; Fed. Cas. 1,459.

68. The acts mentioned in section 5110,

Revised Statutes, are not in the nature of offenses or forfeitures, but rather in the nature of violations of conditions precedent. In *re Seeley*, 19 N. B. R. 1; Fed. Cas. 12,628.

69. The words "fraudulent preference," as used in section 5110, Revised Statutes, do not import moral fraud, but merely mean that a payment shall have been made under circumstances which the law inhibits as a preference. *Id.*

(d) *Act of June 22, 1874.*

70. The ninth section of the act of June 22, 1874, amendatory of the thirty-ninth section of the bankrupt act, does not require the denial of the debtor that the petitioners constitute one-fourth in number and one-third in amount of the creditors to be sworn to, but, in the absence of a rule of the supreme court on the subject, it is proper to require such denial to be verified by the oath of the debtor. In *re Hymes*, 10 N. B. R. 433; 7 Ben. 427; Fed. Cas. 6,986.

71. The ninth section of the act approved June 22, 1874, which relates to the discharge of bankrupts, applies to cases commenced before the act took effect and not then concluded, as well as to cases commenced after its passage. In *re Franke*, 10 N. B. R. 438; 7 Ben. 420; 6 Chi. Leg. News, 414; Fed. Cas. 5,046. Overruled, In *re King*, 10 N. B. R. 566; 3 Dill. 8; 1 Cent. Law J. 506; 7 Chi. Leg. News, 26; 10 Alb. Law J. 249; Fed. Cas. 7,781.

IX. TIME.

72. The Revised Statutes are to be regarded as passed December 1, 1873, and all other acts of the same session of congress passed subsequent to that date are to be treated as subsequent acts, repealing the Revised Statutes so far as they are inconsistent therewith. In *re Oregon Bul. Pr. & Pub. Co.*, 14 N. B. R. 405; 3 Sawy. 614; 11 Amer. Law Rev. 181; 3 Cent. Law J. 515; 14 Alb. Law J. 180; 8 Amer. Law T. Rep. (N. S.) 469; Fed. Cas. 10,561.

73. The act of June 22, 1874, purporting to amend and supplement the bankrupt act of 1867, is to be regarded as having been passed subsequent to the passage of the Revised Statutes, and, although referring in

terms to the act of 1867, is to be construed as referring to the provisions of that act as carried into the corresponding provisions of the Revised Statutes, and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. *Id.*

### X. IN GENERAL.

74. A proceeding in bankruptcy, from the filing of the petition to the distribution of the bankrupt's estate and his discharge, is a single statutory proceeding. *In re York & Hoover*, 4 N. B. R. 156; 1 Abb. (U. S.) 503; 10 Amer. Law Reg. (N. S.) 36; Fed. Cas. 18,139.

75. A court cannot substitute in the place of an expressed intention embodied in a statute a presumed intention, but must administer the intention of congress as manifested by the words of the bankrupt act (1867). *In re Nounnan & Co.*, 7 N. B. R. 15.

76. The rule that the adoption of a statute carries with it the judicial construction of it, considered and authorities referred to. *Goodall, Ass., v. Tuttle*, 7 N. B. R. 193; 3 Biss. 219; 4 Chi. Leg. News, 473, 485; Fed. Cas. 5,533.

77. A transfer void under laws of the state where made is void under the bankrupt act, as the United States supreme court will follow the construction given to such statute by the highest court of the state. *Murry et al. v. Allen, Ass.*, 7 N. B. R. 401; 17 Wall. 351.

78. The sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights or interests of the sovereign. *United States v. Herron*, 9 N. B. R. 535; 20 Wall. 251.

79. Where it was contended that section 17 of the bankrupt act of June 22, 1874, was unconstitutional, on the ground that said act authorized the discharge of a bankrupt upon the surrender of a *portion* of his assets only, *held*, that the *subject* of bankruptcies was committed in full by the constitution to congress and it is not to be interpreted or limited by British statutes existing at the time of the separation of this country from Great Britain. *In re Reiman et al.*, 13 N. B. R. 128; 12 Blatchf. 562; Fed. Cas. 11,675.

80. Only those portions of the bankrupt law that are expressly or impliedly adopted

by the section relating to corporations apply to them. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 N. B. R. 885; 91 U. S. 656.

81. Where a statute has received a known judicial construction, and is substantially re-enacted, the legislature is presumed to adopt such construction. *Woolsey v. Cade*, 15 N. B. R. 238.

82. A., who was insolvent, mortgaged property to B., who knew of A.'s insolvency, to secure a valid loan. In action by A.'s assignee in bankruptcy to set aside the conveyance, *held*, that under the amending act of June 22, 1874, in order to nullify the conveyance, it was necessary that B. knew that it was made in fraud of the provisions of the bankrupt act, or to prevent the property from coming to the assignee or from being distributed under the act. *Campbell, Ass., v. Waite et al.*, 16 N. B. R. 93; 9 Ben. 166; Fed. Cas. 2,374.

### STAY OF PROCEEDINGS.

#### I. WHEN ALLOWED.

#### II. WHEN NOT ALLOWED.

#### III. EFFECT OF.

#### IV. WHEN TO BE MADE.

#### V. VACATION.

See COURTS, 211; INJUNCTION; JUDGMENT, 3, I; SUITS, I.

#### I. WHEN ALLOWED.

1. Execution in the hands of the sheriff against property of bankrupt will be stayed. *In re Jones & Leach*, 1 N. B. R. 165; Fed. Cas. 7,475.

2. Creditors brought an action in a state court alleging that while a debtor was insolvent he purchased certain realty, and praying that the debtor be declared to hold the property in trust. Before the suit was commenced, a voluntary petition in bankruptcy was filed, whereupon the said creditors proved their debts. The bankruptcy court made an order staying proceedings in the state court, and application was made for an order vacating the order to stay. The application was denied. *In re Myers*, 1 N. B. R. 162; 2 Ben. 424; Fed. Cas. 9,518.

3. A debt which is contested in a state



court may be allowed to proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in the bankruptcy proceedings, but execution shall be stayed. *In re Rundle and Jones*, 2 N. B. R. 49; 1 Chi. Leg. News, 30; Fed. Cas. 12,138; *Allen & Co. v. Montgomery*, 10 N. B. R. 504.

4. Even though an attachment has been sued out against a bankrupt more than four months before he applies for a discharge and dismissed on giving a bond upon his application, a state court, pending the question of his discharge, must stay all proceedings therein on a claim provable in bankruptcy, unless unseasonable delay on his part is shown or the court of bankruptcy gives leave to ascertain the amount due. *Hill v. Harding*, 107 U. S. 631.

5. An action against a bankrupt to recover a debt provable against his estate must be stayed until the question of his discharge is determined, notwithstanding the debt may not thereby be barred. *In re Rosenberg*, 2 N. B. R. 81; 8 Ben. 14; 1 Chi. Leg. News, 103; Fed. Cas. 12,054.

6. An order of arrest made by a state court in a suit against a bankrupt upon an affidavit showing that the suit was founded on a debt created by fraud of the bankrupt will not be vacated by the bankruptcy court, but the suit will be stayed until the final determination of the bankruptcy proceedings. *In re Migel*, 2 N. B. R. 153; Fed. Cas. 9,538.

7. Pending an action by a creditor, the debtor filed petition in bankruptcy, but did not apply for a stay of proceedings. Creditor did not prove his claim but proceeded to judgment, after which bankrupt received his discharge. Creditor now sought to examine bankrupt as to his property, on proceedings supplementary to judgment, and bankrupt moved to stay the proceedings. *Held*, that the failure to apply for a stay of proceedings in the first instance did not warrant a refusal of the relief prayed for. *The "World" Co. v. Brooks*, 3 N. B. R. 146.

8. Appeal from circuit court to United States supreme court stays all proceedings from time application for appeal was first presented to circuit judge. *In re Thornhill et al. v. Bank of Louisiana*, 5 N. B. R. 377; Fed. Cas. 13,991.

9. Proceedings in involuntary bankruptcy

were begun in one state against a railroad chartered in two states, and while these were pending a petition was filed in the other state. Upon petition of the creditor instituting the first suit, *held*, second one stayed. *In re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 865; Fed. Cas. 1,677.

10. Proceedings to collect a provable debt shall, on application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge. *In re Belden*, 6 N. B. R. 443; 5 Ben. 476; Fed. Cas. 1,239.

11. If a mortgagee institutes proceedings to foreclose a mortgage after the commencement of proceedings in bankruptcy, such proceedings may, on the application of the assignee, be stayed until the bankruptcy proceedings are closed. *Markson et al. v. Haney*, 12 N. B. R. 484.

12. In an action of *assumpsit* on promissory notes, by holder against makers, a defense setting up that defendants were adjudicated bankrupts, but that time had not arrived for application for discharge, does not constitute a defense, but is sufficient to stay the action and prevent judgment. *Frostman et al. v. Hicks et al.*, 15 N. B. R. 41.

13. An action on a claim, originating in contract fraudulently induced, sounding in damages, is within the provisions of the bankrupt law prohibiting any creditor from prosecuting to final judgment a suit on a provable debt before the debtor's final discharge has been settled. *In re Schwarz*, 15 N. B. R. 330; 14 Blatchf. 196; 52 How. Pr. 513; 15 Alb. Law J. 350; Fed. Cas. 12,502.

14. Where a bankrupt is sued for a debt provable, but not proved, in bankruptcy, he has the right to have the suit stayed until the question of his discharge is settled. If no stay is procured, the creditor can nevertheless proceed to judgment. *Scott v. Ellery*, 142 U. S. 381.

15. A bankrupt discharged after judgment given against him in a state court, in an action pending where he instituted proceedings in bankruptcy, is entitled to the perpetual stay of execution on such judgment. *Boynton v. Ball*, 121 U. S. 457.

## II. WHEN NOT ALLOWED.

16. When the effect of granting a stay upon a judgment against a corporation before execution returned, or setting aside an execution issued thereon, the stockholders of which are personally responsible, will be to discharge "a person or officer or member thereof," where such liability must be predicated of such judgment and execution returned unsatisfied, a motion on the part of defendants to stay proceedings after judgment must be denied. *Allen v. The Soldiers, etc. Co.*, 4 N. B. R. 176.

17. Proceedings for contempt for failure to obey order in proceedings in state court, supplementary to execution, should not be stayed. *In re Hill*, 2 N. B. R. 53; *Fed. Cas.* 6,486.

18. Proceedings in state court will not be stayed until adjudication is had in bankruptcy. *In re Maxwell & Faxton*, 4 N. B. R. (8 vo. ed.) 210.

19. A creditor recovered judgment and execution against a bankrupt in the state court. The bankrupt was subsequently arrested on the execution, and gave a recognizance before a magistrate to appear for examination under the laws of the state for the relief of poor debtors. He appeared, and the examination was continued from time to time. The bankrupt, pending the examination, filed his petition in bankruptcy and an assignee was afterwards chosen. The creditor afterwards filed with the magistrate charges of fraud against the bankrupt, under the statute of the state. *Held*, that such charges of fraud are not a new suit which should be stayed under the twenty-first section of the bankrupt act (1867). *Minion v. Van Nostrand*, 4 N. B. R. 28; 1 *Lowell*, 458; *Fed. Cas.* 9,642.

20. After verdict, and before judgment, in an action in tort for slander and malicious prosecution, the defendant was adjudged bankrupt. Defendant moved for a continuance pending proceedings in bankruptcy. *Held*, defendant was not entitled to a stay of proceedings, as the claim was not provable in bankruptcy under section 19 of the act of 1867. *Zimmer v. Schleeauf*, 11 N. B. R. 313.

21. A stay of proceedings in bankruptcy in the district court is in the discretion of

the circuit court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced. *In re Oregon Bull. Print. & Pub. Co.*, 14 N. B. R. 394; 3 *Sawy.* 529; 8 *Chi. Leg. News*, 143; *Fed. Cas.* 10,560; *R. S.* 4980, 4986.

22. A surrogate's decree for payment of moneys misappropriated by him as administrator was docketed against the bankrupt before institution of bankruptcy proceedings, and an appeal taken from the surrogate's decision refusing to commit the debtor for failure to pay. Pending the bankruptcy proceedings, the surrogate's decision was reversed on the appeal and the proceedings remitted to him to enforce the remedy against the bankrupt's person. *Held*, that the proceedings could not be stayed so as to prevent the commitment of the debtor. *In re Whitney*, 18 N. B. R. 563; *Fed. Cas.* 17,581.

23. Subsequent to final judgment, a stay of a proceeding for the purpose of putting in motion the remedy of arrest reserved to the creditor is not allowable. *Id.*

24. The fact that proceedings in bankruptcy are pending against a firm is not a good plea in abatement in an action against a special partner of the firm against whom the proceedings are not taken; the latter are consequently not entitled to a stay of proceedings which the statute gives for the protection of the bankrupt. *Abendroth v. Van Dolsen*, 131 U. S. 66.

## III. EFFECT OF.

25. A petition for a stay of proceedings filed under the bankrupt act by a stranger who claims perishable property which may have been ordered sold does not make him a party to the suit in bankruptcy, nor can he be bound by the court in bankruptcy against any action of trespass he might bring in a state court against the marshal for the seizure of his property. *Marsh and Palmer, Ex'rs. v. Armstrong* 11 N. B. R. 125.

## IV. WHEN TO BE MADE.

26. A motion for stay of a suit on ground of bankruptcy should be made before trial. *Holden v. Sherwood*, 18 N. B. R. 111.

## V. VACATION.

27. A stay of proceedings will be reached when there is unreasonable delay in the bankruptcy proceedings. In re Belden, 6 N. B. R. 443; 5 Ben. 476; Fed. Cas. 1,239.

## STOCK.

See CORPORATIONS, III.

## STOCKHOLDERS.

## I. WHO ARE.

## II. UNPAID SUBSCRIPTION.

(a) *Preliminary Call Necessary.*

(b) *How Recovered.*

## III. LIABILITY.

(a) *When Exists.*

(b) *When Enforced.*

(c) *Remedy Statutory.*

(d) *Claim of, in Bankruptcy.*

(e) *Avoidance of.*

## IV. IN GENERAL.

See LACHES, 5; PARTNERS, 13; SET-OFF, 2; TRUST, 2.

## I. WHO ARE.

1. The entry of his name on the stock book as a stockholder, though the stock has not been transferred on the books of the company, may be sufficient to give the holder of stock the position of stockholder. Upton, Ass., v. Burnham, 8 N. B. R. 221; 3 Biss. 431; Fed. Cas. 16,798.

2. Party purchasing shares of stock in a company, and in this manner allowing himself to be held out as a stockholder, takes the responsibility of his action. The person who has caused or allowed his title to be registered on the books of the company cannot deny the truth of that representation and disavow the ownership when it ceases to benefit and becomes a burden. Upton, Ass., v. Hansbrough, 10 N. B. R. 368; 3 Biss. 417; 5 Chi. Leg. News, 242; 7 West. Jur. 238; Fed. Cas. 16,801.

3. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. Upton, Ass., v. Tribilcock, 13 N. B. R. 171; 91 U. S. 45.

## II. UNPAID SUBSCRIPTION.

See CORPORATIONS, 24-26, 32; COURTS, 262; ESTATES, 207, 209; TRUSTEE, 226.

(a) *Preliminary Call Necessary.*

4. The charter of a company provided that subscribers to stock should pay therefor in a certain manner and that the balance of payments should be subject to call of majority of stockholders. Held, in such case, that to maintain an action at law for such balance, there must be such call or assessment or something standing in the place thereof, or equivalent thereto, either by the company or a proper tribunal to make stockholder liable. Chandler, Rec., et al. v. Siddle, 10 N. B. R. 286; 8 Dill. 477; 1 Cent. Law J. 341; Fed. Cas. 2,594.

5. A bankruptcy court may make any call upon the stockholders of a bankrupt company, necessary or preliminary to the collection of the assets, as fully as the stockholders or directors could have done if the company had not gone into bankruptcy. Upton, Ass., v. Hansbrough, 10 N. B. R. 368; 3 Biss. 417; 5 Chi. Leg. News, 242; 7 West. Jur. 238; Fed. Cas. 16,801.

6. If the charter of a railroad company provide that in case any stockholder default in the payment of an assessment and the railroad becomes unable to pay interest accrued on its mortgage bonds, the first duty of the company is to enforce the payment of necessary and proper assessments upon the stock, and to prevent the misuse of any fictitious certificates which indicate that the stock has been fully paid for; but a bankruptcy court has no jurisdiction of such proceedings. Gibson et al. v. Lewis, Trustee, 11 N. B. R. 247; 11 Phila. 476; 32 Leg. Int. 22; Fed. Cas. 5,398.

7. Although the balance on the certificate of stock is made subject to the call of the directors, under the instructions of the stockholders, the district court may direct the payment of the balance due. Sanger v. Upton, Ass., 13 N. B. R. 226; 91 U. S. 56.

(b) *How Recovered.*

8. To recover the balance due on a subscription of stock, the assignee in bankruptcy of a corporation may sue at law. Id.

9. When the court makes an order directing payment of the balance on subscriptions, it is not necessary that the stockholders shall be before the court. *Id.*

10. Where subscribers to stock of an incorporated company paid twenty per cent. on their shares, and entered into an agreement with the company that further assessment should not be made thereon, and certificates for full-paid shares were issued to them after the company was adjudicated a bankrupt, and to satisfy the claims of its creditors it became necessary to assess the unpaid stock, it was held that the agreement was void as to creditors, and that proceedings to set aside such agreement should first be commenced in a court of competent jurisdiction. *Scovill v. Thayer*, 105 U. S. 143.

### III. LIABILITY.

See *BANKS*, 10-14; *CORPORATIONS*, 23, 27-30; *ESTATES*, 208; *TRUSTEE*, 225.

#### (a) *When Exists.*

11. A national bank has, in order to prevent loss upon a debt previously contracted, a lien upon the share of an individual stockholder. *In re Bigelow*, 1 N. B. R. 202; 2 Ben. 469; Fed. Cas. 1,395.

12. In a corporation *de facto* the stockholders are liable for the unpaid balances due on certificates of stock. *Upton, Ass. v. Hansbrough*, 10 N. B. R. 368; 3 Biss. 417; 5 Chi. Leg. News, 242; 7 West. Jur. 238; Fed. Cas. 16,801.

13. When the by-laws of a bank make the stock of its stockholders subject to all indebtedness of the bank, the bank has a right to enforce this by-law in case of bankruptcy of the stockholder. *In re Morrison*, 10 N. B. R. 105; 6 Chi. Leg. News, 110; Fed. Cas. 9,839.

14. Where copies of the charter and by-laws were placed in hands of one who subsequently subscribed for shares of stock, he is bound thereby, although he did not read them. *Upton, Ass. v. Tribilcock*, 13 N. B. R. 171; 91 U. S. 45.

15. A promise to take shares of stock imports a promise to pay for them. *Id.*

16. Where a party takes a certificate of stock in blank and pays part of it, he is liable for the balance due thereon. *Sanger v. Upton, Ass.*, 13 N. B. R. 226; 91 U. S. 56.

16a. A corporation filed papers for the purpose of reorganizing with an increased capital, in accordance with a state statute. The corporation became bankrupt and the assignee thereof brought an action to enforce certain subscriptions. *Held*, that the defendant could not deny the regularity of the organization of the new company. *Chubb v. Upton, Ass.*, 16 N. B. R. 537; 95 U. S. 665.

#### (b) *Where Enforced.*

17. It is especially the province of a court of equity, in which an account can be stated of the debts and stock and distribution made, to enforce the liability of the stockholders; but one creditor cannot, by an individual suit, appropriate to himself the entire benefit of the security and exclude all others. *Pollard v. Bailey, Ass.*, 11 N. B. R. 276; 20 Wall. 520.

#### (c) *Remedy Statutory.*

18. At common law the individual liability of stockholders in a corporation does not exist; it is always a creature of statute. *Id.*

19. Where the provision for the liability of a stockholder is coupled with a provision for a special remedy, that remedy alone must be employed, but a general liability created by statute without a remedy may be enforced by an appropriate common-law action. *Id.*

20. The bankruptcy of a corporation does not prevent judgment being obtained against the corporation, and the creditor, in default of obtaining satisfaction under the judgment, from the property of the corporation, may pursue the remedy given him by statute against stockholders. *Allen v. Ward*, 10 N. B. R. 285.

#### (d) *Claim of.*

21. Under the act of 1867 a bank should prove its demand for a debt due as secured by stock, and, by leave of court, have it sold, the proceeds to be applied to payment of the debt, and prove, as a creditor of the estate, for any balance that may remain. *In re Morrison*, 10 N. B. R. 105; 6 Chi. Leg. News, 110; Fed. Cas. 9,839.

22. The statutory liability of stockholders

is not a claim provable against them in bankruptcy. *James, Adm'x, v. The Atlantic Delaine Co. et al.*, 11 N. B. R. 390; Fed. Cas. 7,179.

(e) *Avoidance of.*

23. An arrangement by which stock is nominally paid and the money immediately taken back by way of loan to the stockholder is a device to change the debt from a stock debt to a loan, and is not a valid payment as against the corporation creditors, though it may be good between the stockholder and the company. *Sawyer et al. v. Hoag et al.*, 9 N. B. R. 145; 17 Wall. 610.

24. It is too late for a stockholder, after the company has become insolvent, to avoid his liability on the ground that false representations were made to him that no assessment could be made on his stock. *Upton, Ass., v. Hansbrough*, 10 N. B. R. 368; 3 Biss. 417; 5 Chi. Leg. News, 242; 7 West. Jur. 238; Fed. Cas. 16,801.

25. Where a party subscribed for shares of stock of a corporation, paying only a portion of the par value thereof, *held*, that his liability for the balance due on said stock is not affected by a representation that there is no personal liability for such balance. *Upton, Ass., v. Tribilcock*, 13 N. B. R. 171; 91 U. S. 45.

26. A stockholder in an insurance company rendered insolvent by a fire cannot escape his liability on a stock-note by surrendering a certificate of indebtedness on one of the adjusted policies and withdrawing his note. *Jenkins, Ass., v. Armour et al.*, 14 N. B. R. 276; 6 Biss. 312; 8 Chi. Leg. News, 267; 22 Int. Rev. Rec. 169; Fed. Cas. 7,260.

#### IV. IN GENERAL.

See CORPORATIONS, 81, 83; CONTRACTS, 3; EVIDENCE, 20, 25.

27. After commencement of proceedings in bankruptcy against a railroad company, the stockholders caused to be bought up in their behalf, with money furnished by them, all the floating debts of the company, except two which constituted a small portion of the indebtedness, and then petitioned that the proceedings should be suspended and the property restored to the company. *Held*,

that upon giving security for the two debts not bought up, the petition should be granted. *In re Ind., Cin. & Laf. R. R. Co.*, 8 N. B. R. 802; 5 Biss. 287; 21 Pittsb. Leg. J. 4; Fed. Cas. 7,038.

28. Stockholders of a bank whose charter provides that they shall be bound respectively for its debts in proportion to their stock therein must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital. *Pollard v. Bailey, Ass.*, 11 N. B. R. 277; 20 Wall. 520.

29. By reason of their joint and several liability, stockholders do not become copartners, so that all the members, as partners, would be liable to be adjudicated bankrupt as a firm. *James, Adm'x, v. The Atl. Delaine Co. et al.*, 11 N. B. R. 390; Fed. Cas. 7,179.

30. The individual liability of stockholders for the debts of the corporation to the amount of their stock is neither property nor a right of property, nor a credit of the bankrupt corporation, and the assignee has no legal or equitable right or interest therein. *Dutcher, Ass., v. The Marine Nat. Bank of N. Y. et al.*, 11 N. B. R. 457; 12 Blatchf. 435; Fed. Cas. 4,203.

31. That the matter of the transfer of shares of railroad stock might be investigated by the master, an order of the master was made that certain books and documents be produced. Such order was not complied with, and a motion for an attachment for contempt of court against the president of the railroad was therefore granted. *Erie R. R. Co. v. Heath et al.*, 4 N. B. R. 177; Fed. Cas. 4,518.

32. The debt due to a stockholder for losses sustained by him on policies issued by the corporation cannot be set off against his indebtedness to the corporation for unpaid subscriptions to its stock. *Scammon v. Kimball, Ass.*, 13 N. B. R. 445; 92 U. S. 362.

#### STOPPAGE IN TRANSITU.

See SALE, 47.

1. L. contracted to sell to the bankrupt certain wine "to arrive" at a fixed price. The wine on arrival was stored in the name of L. in a bonded warehouse chosen by the

bankrupt, and the bankrupt withdrew a part of the wine before his failure, L. consenting as required by the treasury department. After the petition in bankruptcy was filed the remaining wine was withdrawn by L., who paid the whole warehouse charges. The bankrupt's note given for the amount of the purchase came due and was not paid. *Held*, that L. had the right of stoppage *in transitu*, and that the delivery of part was not a delivery of the whole, with reference to the right of stoppage *in transitu* as to the remainder. *In re Bearns*, 18 N. B. R. 500; Fed. Cas. 1,191.

2. The right of stoppage *in transitu* depends upon the fact that the goods have not come to the actual or constructive possession of the vendee. *Id.*

### SUBPOENA.

See PLEADING AND PRACTICE, XV, (h).

### SUBROGATION.

See MORTGAGES, 48.

1. A party is entitled to be subrogated to the rights of the creditor, without any agreement to that effect, where he has been compelled to pay the debt of a bankrupt in order to protect his own rights. *Whithed et al. v. Pillsbury and Titcomb, Ass.*, 18 N. B. R. 241; Fed. Cas. 17,572.

2. Where a United States revenue officer made good to the government, by payment, a dishonored check received from a government debtor, *held*, that he is subrogated to rights of the United States as a preferred creditor. *In re McBride et al.*, 19 N. B. R. 452; Fed. Cas. 8,662.

3. The firm A. & B. were sureties for a debt which was paid out of the firm assets. On dissolution of the partnership a balance was due to B. from A., who subsequently went into bankruptcy. *Held*, that B. could not be subrogated to the rights of the creditor whose claim the firm satisfied, against A.'s estate, as against other creditors of A. *In re Smith*, 16 N. B. R. 113; Fed. Cas. 12,991.

4. An assignee who redeems pledges is subrogated to the rights of the pledgee until, from the proceeds of the pledges redeemed,

the fund is made good. *McLean et al., Ass. v. Cadwalader*, 15 N. B. R. 333.

5. Where a creditor having a judgment against a bankrupt, which is a lien upon his real estate, proves his debt, and comes in upon the bankrupt's estate for the whole debt, the assignee in bankruptcy is entitled to be subrogated to the rights of the judgment creditor as regards his lien upon the real estate. *Wallace v. Conrad*, 3 N. B. R. 19.

### SUITS.

#### I. INJUNCTION AND STAY.

#### II. BY ASSIGNEE.

#### III. PLEADING.

#### IV. WHO PLAINTIFF.

#### V. STATE COURTS AND COLLATERAL ACTION.

See LIMITATIONS, STATUTE OF, 24, 53; STATUTORY CONSTRUCTION, 61; TRUSTEE, 171, 178, 196.

#### I. INJUNCTION AND STAY.

#### See INJUNCTION; STAY OF PROCEEDINGS.

1. Whether a railroad chartered in two states is two corporations or one, a proceeding in bankruptcy will be stayed pending a prior proceeding of the same nature in the other state. *In re Boston, H. & E. R. R. Co.*, 6 N. B. R. 209; 9 Blatchf. 101; 6 Amer. Law Rev. 365; Fed. Cas. 1,677.

2. Creditors acquire no right to proceed in an action against a bankrupt pending determination of the question of discharge, from the fact that they have not proved their claim. *In re Schwartz*, 15 N. B. R. 330; 14 Blatchf. 196; 52 How. Pr. 513; 15 Alb. Law J. 350; Fed. Cas. 12,502; sec. 5106, R. S.

3. A creditor instituted suit against a bankrupt for the recovery of a debt alleged to be due for the sale of merchandise; and on affidavit showing that the debt was fraudulently contracted, an order of arrest was entered and the bankrupt held to bail. *Held*, that the debt was provable, and that a stay of proceedings should be granted until the question of the bankrupt's discharge should be determined, notwithstanding the debt may not thereby be barred. *In re Rosenberg*, 2 N. B. R. 81; 8 Ben. 14; 1 Chi. Leg. News, 103; Fed. Cas. 12,054.

4. Complainants filed petition in Louisiana, and proposed a composition, which was accepted, and complainants appointed custodians of their property and authorized to protect and collect the same for purposes of composition. In suit to enjoin a judgment obtained against them after commencement of bankruptcy proceedings, *held*, that bankrupts did not stand in position of assignee so far as to maintain an action under Revised Statutes. *McGehee et al. v. Hentz et al.*, 19 N. B. R. 136; Fed. Cas. 8,794.

## II. BY ASSIGNEE.

5. A fund was in the hands of an assignee in bankruptcy for distribution, to which assignees under a general assignment, and assignees under a special assignment prior to the general one, laid claim. An equity suit was pending between the parties involving their rights to the fund. *Held*, that the bankrupt court would detain the fund until the rights of the parties were determined. In re *Sabin*, 18 N. B. R. 151; 10 Chi. Leg. News, 364; 3 Cin. Law Bul. 625; Fed. Cas. 12,195.

6. An adjudication of bankruptcy is a sufficient excuse, under the laws of Illinois, to excuse an assignee for not bringing suit against the maker of the note, in order to hold the assignor. *Wills et al. v. Clafin et al.*, 13 N. B. R. 487; 92 U. S. 185.

7. An assignee in bankruptcy secured a judgment in a state court against B. An action was brought to set aside a conveyance by B. on the ground of fraud. Objection was made that the assignee could not sue in a state court. *Held*, that section 711, Revised Statutes, does not extend to this case. *Wente v. Young et al.*, 17 N. B. R. 90.

8. An action of trover will not lie by an assignee against a judgment creditor to recover the value of property sold under an execution prior to the commencement of the proceedings in bankruptcy. *Gates, Ass. v. American et al.*, 14 N. B. R. 141; Fed. Cas. 5,269.

9. Suits may be prosecuted to final judgment by an assignee to recover the assets of a bankrupt in the circuit or district court in a district other than that in which the decree in bankruptcy is entered. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 331; 94 U. S. 553.

10. If a debtor transfers property in the United States to prefer an alien, the latter is liable to an action by the assignee of the bankrupt in a court of the United States. *Olcott, Ass. v. MacLean et al.*, 14 N. B. R. 379.

11. A petition of bankrupt's assignee to recover property from one claiming by virtue of voluntary assignment, said petition being brought in the bankruptcy court, is a suit at law within the meaning of the act. In re *Krogman*, 5 N. B. R. 116; Fed. Cas. 7,936.

## III. PLEADING.

### See PLEADING AND PRACTICE.

12. Plaintiff began an attachment suit against a debtor who was adjudicated within four months. Defendant gave bond. Judgment for plaintiff and an order for the property. This order was not obeyed and plaintiff sued on the bond. Defendants urged that plaintiff's rights were supplanted by the bankruptcy proceedings. *Held*, that such proceedings should have been pleaded and that the state court was not ousted of its jurisdiction. *Haber v. Klauberg et al.*, 15 N. B. R. 377.

13. A creditor who has not proved his claim, though it was provable, sued on it. Defendant pleaded his bankruptcy and that the debt was provable and would be barred by a discharge, and that proceedings were pending. Defendant did not ask that the case be continued to enable him to obtain a discharge. *Held*, that the claim could not be properly prosecuted to judgment. *Holland v. Martin*, 18 N. B. R. 359.

14. The assignee cannot plead a discharge in bankruptcy in bar in an action against the bankrupt. *Serra et al. v. Hoffman & Co.*, 17 N. B. R. 124.

15. Prior to bankruptcy, bankrupts issued warehouse receipts. In an action by the assignee, *held*, that on account of fraud he was estopped to deny validity of said receipts. *Sharpe, Ass. v. The Phila. Warehouse Co.*, 19 N. B. R. 378.

## IV. WHO PLAINTIFF.

16. G., a creditor of a bankrupt, upon refusal of assignee to proceed, brought an action in his own name against the bankrupt, as-

signee in bankruptcy and others to reach property fraudulently concealed or conveyed by the bankrupt. *Held*, that he could not maintain the action in his own name. *Glenny v. Langdon et al.*, 19 N. B. R. 24; 98 U. S. 20.

17. A party who purchases a chose in action from the assignee cannot maintain an action thereon in his own name in a state court where the laws of the state do not permit an assignee of a chose in action to sue in his own name. *Leach v. Greene*, 12 N. B. R. 378.

18. When a suit is brought by a bankrupt with the consent of the trustee in bankruptcy, the verdict, if for the plaintiff, need not be for the use of the trustee. *Southern Ex. Co. v. Connor*, 12 N. B. R. 53.

19. An assignee in bankruptcy cannot maintain an action in trover where the conversion was consummated before he had a right to possession. *Jones v. Miller, Ass. etc.*, 17 N. B. R. 816; 1 N. J. Law J. 113; *Fed. Cas.* 7,482.

20. Six months before bankruptcy S. conveyed real estate to one H., who, four months afterwards, conveyed the same to S.'s wife. Assignee filed bill to set aside conveyances as without consideration and in fraud of creditors. *Held*, that assignee in bankruptcy could maintain such suit. *Johnson, Ass., v. Helmstaeder et al.*, 19 N. B. R. 71.

#### V. STATE COURTS AND COLLATERAL ACTIONS.

21. State courts are not divested of jurisdiction of cases pending in them by the initiation of bankruptcy proceedings against one party, unless it be brought to the notice of the state court. *Bracken v. Johnston*, 15 N. B. R. 106; 4 Dill. 518; 5 Amer. Law Rec. 461; 4 Cent. Law J. 9; 11 Amer. Law Rev. 609; 3 N. Y. Wkly. Dig. 573; 1 Cin. Law Bul. 358; *Fed. Cas.* 1,761.

22. Sections 1 and 2 of the bankrupt act of 1867 held not to confer exclusive jurisdiction on United States courts in suits for enforcement of right under the act, but only as to adjudication. *Cook v. Waters et al.*, 9 N. B. R. 155.

23. The effect of bankruptcy in suits pending in state courts is to stay or suspend them. They may, with leave of bankrupt court,

be prosecuted to judgment to ascertain the amount due, but execution cannot be issued and executed. *Allen v. Montgomery et al.*, 10 N. B. R. 504.

24. A suit in equity is rendered defective merely by the bankruptcy of the plaintiff and the assignees may be brought forward by supplemental bill. *The Collateral Security Bank v. Fowler, Trustee*, 12 N. B. R. 281.

25. In case of a fraudulent disposition of the property of a corporation by its officers, the stockholders and creditors should not be confined to their remedy against the officers alone, but should be allowed their remedy against the party to whom the transfer has been made. *In re Jaycox et al.*, 7 N. B. R. 578; *Fed. Cas.* 7,241.

26. In an action brought by an assignee in bankruptcy to foreclose a mortgage a state court has jurisdiction. *Burlingame, Ass., v. Parce et al.*, 17 N. B. R. 246.

27. Every presumption is in favor of the validity of the adjudication in a collateral action, where the bankrupt appears after notice, and makes no objection to the court's jurisdiction. *New Lamp C. Co. v. Ansonia B. & C. Co.*, 13 N. B. R. 385; 91 U. S. 656.

28. Rule to show cause why certain judgment creditors of the bankrupt should not be enjoined from proceeding under creditors' bills against the bankrupt in the state courts, and from enforcing an assignment by the debtor to the receiver appointed in such creditors' suits. *Held*, that such creditors might be enjoined from proceeding further in the state court. *In re Whipple*, 13 N. B. R. 373; 6 Biss. 516; 8 Chi. Leg. News, 134; *Fed. Cas.* 17,512.

29. All other proceedings for the administration of the assets of a debtor are superseded by proceedings in bankruptcy, subject only to the priorities which were obtained by the diligence of any creditor. *Id.*

30. The question of whether an assignment under a state law is void may be raised in a collateral action. *Shryock et al., Ass., v. Bashore*, 13 N. B. R. 481; *Fed. Cas.* 12,820.

31. Proceedings to prove demands are not separate suits at law or in equity, but a part of the suit in bankruptcy. *Leggett v. Allen*, 110 U. S. 741.

32. Subsequent to the granting of a new trial, but before the second trial, the defend-



ant received his discharge. The claim was one provable under the bankrupt law. *Held*, discharge in bankruptcy a bar. Case dismissed without prejudice to the remedy under bankrupt law. *Humble v. Carson*, 6 N. B. R. 84.

33. Proceedings in bankruptcy are not a bar to the further prosecution of a suit in the name of the bankrupt. *Thatcher v. Rockwell*, 105 U. S. 467.

## SURETY.

### I. LIABILITY.

### II. SECURITY.

### III. DEFENSE.

### IV. RELEASE.

See LIEN, 2; LIMITATIONS, STATUTE OF, 11; PARTNERS, 198; PREFERENCES, 252; SECURED CLAIMS, 30.

### I. LIABILITY.

See ATTACHMENT, 52; CLAIMS, 158, 160.

1. The obligation of the principal arises when the surety becomes liable for his debt. In re Perkins et al., 10 N. B. R. 529; 6 Biss. 185; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 185; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 48; Fed. Cas. 10,983.

2. The liability of the principal to his surety, within the meaning of the bankrupt act, is considered as having been contracted when the instrument was signed. *Id.*

3. To dissolve an attachment the defendant gave an undertaking with sureties. It was held that his discharge in bankruptcy would not prevent judgment in an action against his sureties. *Holyoke v. Adams*, 10 N. B. R. 270.

4. The discharge given a bankrupt does not include a liability as a surety for a public officer. *United States v. Heron*, 9 N. B. R. 535; 20 Wall. 251.

5. A *feme covert* does not become a surety for her husband by charging her inchoate right of dower for her husband's benefit. *Hiscock, Ass. etc., v. Jaycox et al.*, 12 N. B. R. 507; Fed. Cas. 6,581.

### II. SECURITIES.

6. A surety on a note who takes an assignment of a bond for title to land to indemnify

himself against loss has priority over judgment creditors of the assignor. In re Reynolds, 16 N. B. R. 158; Fed. Cas. 11,724.

7. A. becoming surety for B., the latter pledged with the former certain bonds and stocks to secure him. On the bankruptcy of B., *held*, that A. was entitled to prove and receive dividends on the whole amount he was compelled to pay without regard to the securities held. *Jervis v. Smith*, 8 N. B. R. 147.

8. The fact that the sureties on a bond are indemnified by a mortgage does not render a claim on the bond a secured claim. In re Lloyd, 15 N. B. R. 257; 5 Amer. Law Rec. 679; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113; Fed. Cas. 8,429.

9. A mortgage to secure a debt and to secure the mortgagee as surety for the mortgagor constitutes a valid lien upon the property mortgaged on the date of its record, for such amount as may be due on the debt secured. *Milner, Jr., v. Meeks, Ass., et al.*, 17 N. B. R. 83; 95 U. S. 252.

10. A creditor is entitled to the benefit of the indemnity held by the surety, and can seek in equity to be subrogated to his rights, reach the security and satisfy his debt. In re Stewart, 1 N. B. R. 42; 1 Amer. Law T. Rep. Bankr. 16; 15 Pittsb. Leg. J. 222; Fed. Cas. 13,418.

11. A. was surety on a note given by a firm in which he was a partner. The note was secured by property of A. A. and the firm both becoming bankrupt, it was held that the creditor should prove the whole debt against the firm assets and the deficiency against A.'s assets. In re May et al., 17 N. B. R. 192; Fed. Cas. 9,327.

### III. DEFENSE.

12. In an action of debt upon a guardian's bond, in which the surety set up a discharge in bankruptcy, *held*, a good defense. *Reitz v. The People*, 16 N. B. R. 96.

13. A surety may pay a debt for which he is contingently liable by giving his individual note, if such note is expressly received as payment. In re Morrill, 8 N. B. R. 117; 2 Sawy. 356; Fed. Cas. 9,821.

14. Where a judgment against the sureties on an appeal bond follows a judgment

against the principal, sureties discharged in bankruptcy pending such appeal must plead such discharge before judgment is rendered, or it will not avail as a defense. *Jones et al. v. Coker et al.*, 16 N. B. R. 843.

15. A joint request was made by the individual members of a firm soliciting B. to become a surety of one of them in an administration bond. A demurrer that the plea set up no debt to the defendant due from the bankrupt firm was sustained and the judgment was affirmed on appeal. *Forsyth v. Woods*, 5 N. B. R. 78; 11 Wall. 484.

16. An action was brought upon an undertaking, on which the defendants were sureties, upon an appeal from a judgment. The judgment debtor was discharged in bankruptcy before the affirmance of the judgment, and the defendants set up this discharge as a defense. *Held*, that it was no defense. *Kuapp et al. v. Anderson et al.*, 15 N. B. R. 316.

#### IV. RELEASE.

See *COMMERCIAL PAPER*, 14, 59; *DISCHARGE*, XIV, (e), 270, XV, (e).

17. A surety on a guardian's bond is not included among those not released by a discharge in bankruptcy by section 5117, Revised Statutes. *Ex parte Taylor*, 16 N. B. R. 40; 1 *Hughes*, 617; 24 *Pittsb. Leg. J.* 205; *Fed. Cas.* 18,773.

18. The surety is released by the giving by the holder of a note of an extension to the principal for valuable consideration without the assent of the surety. *The Valley Nat. Bank v. Meyers, Ass. etc.*, 17 N. B. R. 257; *Fed. Cas.* 16,821.

19. An assignee in bankruptcy accepted a lease held by the bankrupt and sold the interest so acquired to the lessor. *Held*, that the guarantor of the lease was discharged from all liability accruing after the commencement of the bankruptcy proceedings, as the lease was extinguished. *White v. Griffing*, 18 N. B. R. 399.

20. A surety cannot be discharged where the creditor is without fault. *Watson v. Poague et al.*, 15 N. B. R. 473.

21. If a principal debtor becomes insolvent or procures a discharge in bankruptcy, a surety is not released, and if the principal is

discharged by his creditors the effect is the same. *The "Home,"* 18 N. B. R. 557; *Fed. Cas.* 6,657.

#### SURRENDER.

See *PREFERENCES*, XV.

1. If a creditor prove his debt against the bankrupt, he cannot afterwards sue the bankrupt on the debt, and proceedings thereon against the bankrupt and unsatisfied judgments against the bankrupt are discharged and surrendered by proving the debt. *In re Levy et al.*, 1 N. B. R. 66; 2 *Ben.* 169; *Fed. Cas.* 8,297.

2. Bankrupts surrendered their property to register, who appointed a watchman to guard and keep it, and submitted a report of his action to the district judge for approval, who ordered testimony taken. *In re Bogert et al.*, 2 N. B. R. 178; 1 *Chi. Leg. News*, 342; *Fed. Cas.* 1,599.

3. When bankrupts delay surrendering their assets, an order will issue for their immediate surrender to the proper officer. *In re Shafer et al.*, 2 N. B. R. 178; 1 *Chi. Leg. News*, 326; *Fed. Cas.* 12,694.

4. In order to prove a debt unlawfully preferred the party must surrender the unlawful preference wholly—wipe out the security entirely. *In re Stephens*, 6 N. B. R. 533; 3 *Biss.* 187; *Fed. Cas.* 13,335.

5. In voluntary cases the bankrupt may surrender his property, but in involuntary cases the marshal alone is authorized, as messenger, to seize and retain bankrupt's property until assignee is appointed. *In re Howes et al.*, 9 N. B. R. 423; 7 *Ben.* 102; *Fed. Cas.* 6,787.

#### TAXES.

See *CLAIMS*, 99, 100, 131; *CONSTITUTIONAL LAW*, 30; *ESTATES*, 224; *STATE LAWS*, 19.

1. A state has a prior lien on all her realty for taxes, which may be enforced to the prejudice of any claim of her citizens; but if her claim is for a debt other than taxes, she is not entitled to preference over other creditors of the same class. *In re Brand*, 3 N. B. R. 85; 3 *Hughes*, 334; 2 *Amer. Law T. Rep. Bankr.* 66; *Fed. Cas.* 1,809.

2. Funds in the hands of an assignee are liable to taxation by the state. *In re Mitchell*, 16 N. B. R. 535; 17 Alb. Law J. 26; Fed. Cas. 9,658.

3. A county treasurer filed a claim against an assignee. The assets of the bankrupt had been sold by the assignee and the proceeds deposited in a designated bank to await the determination of litigation. The funds were subject alone to the control of the court. It was held that they were not liable to the state tax. *In re Booth*, 14 N. B. R. 232; 8 Chi. Leg. News, 307; 1 Cin. Law Bul. 181; Fed. Cas. 1,645.

4. A mortgagee out of possession, the holder of a mechanic's lien, or a party who derived title through the assignee in bankruptcy, would be entitled to appear and contest establishment and confirmation of the tax title. *Meeks v. Whatley*, 10 N. B. R. 498.

### TESTIMONY.

See EVIDENCE; EXAMINATION OF BANKRUPT.

### TIME.

#### I. COMPUTATION.

#### II. GENERAL.

See COURTS, VI; PETITIONS, V; PLEADING AND PRACTICE, 226; PREFERENCE, 10.

#### I. COMPUTATION.

1. Where any particular number of days is prescribed by the statute, and the last day falls on Sunday or a public holiday, the last day shall be excluded. *In re Lang*, 2 N. B. R. 151; Fed. Cas. 8,056.

2. Where a decree is not announced and delivered by the judge until a date subsequent to the one on which it was signed, it only takes effect from the latter date. *In re B. H. & E. R. R. Co.*, 6 N. B. R. 222; 9 Blatchf. 409; 6 Amer. Law Rev. 582; Fed. Cas. 1,878.

3. The date of the execution and delivery of deeds and not date named therein is the time from which to reckon the six months within which a petition in bankruptcy is to be filed where the deed is intended to defraud creditors. *In re Rooney*, 6 N. B. R. 163; Fed. Cas. 12,032.

4. The act of 1873 provided that the exemptions shall be such as allowed by the state laws of 1871. If the state law was changed during the year 1871 the exemptions allowed should be according to the law in force at the close of the year. *In re Baer*, 14 N. B. R. 97; Fed. Cas. 723.

5. Where a statute requires publication "once in each week for four weeks," seven days should intervene between each publication. *In re King et al.*, 7 N. B. R. 279; 5 Ben. 453; Fed. Cas. 7,779.

6. December 8, 1869, notes, accounts and property were assigned by the bankrupt to secure a debt, and April 8, 1870, petition in bankruptcy was filed. *Held*, that the securities and property were assigned within four months of the filing of the petition in bankruptcy. *Dutcher v. Wright, Ass. etc.*, 16 N. B. R. 331; 94 U. S. 553.

### II. GENERAL.

7. The period of four months before proceedings in bankruptcy within which transfers of property are void as preferences, having been changed by the act of 1874 to two months, it was held that a preference given before such change more than two months before proceedings vested a right to the property transferred in the assignee, which was not taken away by the change of law. *Auffmordt v. Rasin*, 102 U. S. 620.

8. Where the question is as to effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. *In re Wynne*, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

### TITLE.

See ESTATES; EXEMPTIONS, II.

### TORTS.

#### I. ARE NOT WITHIN THE BANKRUPT ACT.

#### II. ACTIONS FOR.

(a) *Judgments in, Provable.*

(b) *Verdict Not Provable.*

#### III. WHEN ASSIGNEE MAY RECOVER FOR.

#### IV. NON-ASSIGNABLE.

#### V. RECOVERY FOR.

## I. ARE NOT WITHIN THE BANKRUPT ACT.

See HABEAS CORPUS, 3.

1. A suit for fraudulently and deceitfully recommending a person as worthy of trust and confidence is not within the description of assets in the fourteenth section of the bankrupt act of 1867. In re Crockett, 2 N. B. R. 75; 2 Ben. 514; Fed. Cas. 3,402.

2. Rights of action for torts to debtor's person do not pass to the assignee. Wright et al. v. Bank, 18 N. B. R. 87; 8 Biss. 243; 18 Alb. Law J. 115; 10 Chi. Leg. News, 348; 6 Reporter, 229; 26 Pittsb. Leg. J. 11; Fed. Cas. 18,078.

3. On petition to vacate discharge, *held*, that cause of action *ex delicto* is not within description of assets which pass to the assignee. In re Brick, 19 N. B. R. 508.

## II. ACTIONS FOR.

See REPLEVIN, 1.

### (a) *Judgments in, Provable.*

4. An action for assault and battery and false imprisonment may be prosecuted to final judgment after petition in bankruptcy is filed, and a judgment recovered may be proved against bankrupt's estate. In re Hennocksburgh & Block, 7 N. B. R. 87; 6 Ben. 150; Fed. Cas. 6,367.

5. Plaintiff had recovered a judgment in an action in tort before petition was filed. *Held* a provable debt. Howland v. Carson, 16 N. B. R. 372.

### (b) *Verdict Not Provable.*

6. A mere verdict in an action for a personal tort is not a provable debt. Black v. McClelland, 12 N. B. R. 481; 7 Chi. Leg. News, 420; 1 N. Y. Wkly. Dig. 174; Fed. Cas. 1,462.

## III. WHEN ASSIGNEE MAY RECOVER FOR.

7. An assignee in bankruptcy may recover damages for an injury or detention of goods by a party to whom they were transferred by the bankrupt contrary to the provisions of the bankrupt act, and such recovery may be in an action to obtain possession of the

property. Schumann, Ass., v. Fleckenstein, 15 N. B. R. 224; 4 Sawy. 174; 9 Chi. Leg. News, 174; Fed. Cas. 12,828.

## IV. NON-ASSIGNABLE.

8. In absence of statute authorizing it a right to a penalty cannot be assigned, nor a right of action for tort. Wright, etc. v. Bank, 18 N. B. R. 87; 8 Biss. 243; 18 Alb. Law J. 115; 10 Chi. Leg. News, 348; 26 Pittsb. Leg. J. 11; Fed. Cas. 18,078.

## V. RECOVERY FOR.

9. The injured party can recover but once but he may sue joint wrong-doers separately until the full amount of the damages sustained is recovered. Sessions v. Johnson et al., Ass., 17 N. B. R. 64; 95 U. S. 347.

## TRADER.

See COMMERCIAL PAPER, 85; DEFINITIONS, 33-31; ACTS OF BANKRUPTCY, I, (b).

## TRESPASS.

See MARSHAL, 3, 4, 6, 10-12; TORTS, 4, 6.

## TROVER.

See PLEADING AND PRACTICE, 93; SUITS, 8, 12.

1. An action of trover can be maintained by an assignee to recover property transferred by bankrupt, who had knowledge of facts sufficient to bring home to the minds of reasonable men knowledge of his insolvency, to a creditor knowing these facts. Rison, Ass., v. Knapp, 4 N. B. R. 114; 1 Dill. 186; Fed. Cas. 11,861.

2. An assignee may bring trover for property converted prior to his appointment as assignee, if done after the filing of the petition in bankruptcy. If the conversion was prior to the filing of the petition, he must sue in equity. Mitchell v. McKibbin, 8 N. B. R. 548; 29 Leg. Int. 412; 21 Pittsb. Leg. J. 77; Fed. Cas. 9,666.

3. Where a party has come lawfully to possession of property, trover or replevin will

not lie till after demand and refusal. This does not appeal where, before suit, the defendant has disposed of the goods. *Linder, Ass., v. Lewis et al.*, 19 N. B. R. 455.

## TRUST.

### I. WHEN ARISES.

### II. WHEN DOES NOT ARISE.

### III. ORIGIN IMMATERIAL IN EQUITY.

### IV. WHEN PROPERTY PASSES TO ASSIGNEE.

### V. RECOVERABLE BY CESTUI QUE TRUST IN ASSIGNEE'S HANDS.

#### (a) When.

#### (b) When Not.

### VI. IN GENERAL.

See COURTS, 6, 40, 181, 148, 171; DISCHARGE, 291; ESTATES, 163, 235.

### I. WHEN ARISES.

1. The *cestui que trust* under a trust deed to secure present loans and subsequent advances will be protected as to such advances against the claims of the borrower, who has declared the land a homestead, and has subsequently obtained such advances and fraudulently concealed his declaration of homestead. *In re Haake*, 7 N. B. R. 61; 2 Sawy. 231; Fed. Cas. 5,888.

2. Capital stock or shares—the unpaid subscription in particular—constitute a trust fund for the benefit of the corporation's general creditors, which trust cannot be defeated by any device short of an actual payment in good faith. *Sawyer et al. v. Hoag, Ass., et al.*, 9 N. B. R. 145; 17 Wall. 610.

3. Where land is purchased with the money of A., B. taking the title as a matter of convenience, a trust is raised in favor of A., wholly or in part, as he may have paid all or part of the purchase-money; and such trust is of the realty and of the proceeds thereof, if it has been disposed of to a *bona fide* purchaser for valuable consideration without notice. *In re Pierson*, 10 N. B. R. 107; Fed. Cas. 11,153.

### II. WHEN DOES NOT ARISE.

4. Where a creditor has received from his debtor money, under circumstances which were entirely lawful but for the provisions

of the bankrupt law, it is free from all trust and claim on behalf of the *cestui que trust*, unless it is shown that the creditor knew of the trust. *White v. Jones*, 6 N. B. R. 175; 29 Leg. Int. 325; Fed. Cas. 17,550.

5. Although a note given to a wife by her husband bears an indorsement to the effect that it was given for money accruing to her out of her father's estate, if it was given for funds in which the husband had a marital interest and the proceeds had been reduced to possession by the husband, the note does not constitute a trust or gift in favor of the wife. *Canby, Ass., v. McLearn*, 18 N. B. R. 22; Fed. Cas. 2,378.

### III. ORIGIN IMMATERIAL IN EQUITY.

6. It makes no difference in equity whether a trust is written out by the parties or is a creation of law. *In re Jaycox & Green*, 7 N. B. R. 808; 7 West. Jur. 18; Fed. Cas. 7,240.

### IV. WHEN PROPERTY PASSES TO ASSIGNEE.

7. The trust in real estate held by wife of debtor, adjudicated bankrupt, if purchased and paid for by bankrupt in fraud of his creditors, inures as assets to the assignee. *In re Meyers*, 1 N. B. R. 162; 2 Ben. 424; Fed. Cas. 9,518.

8. Property held in trust merely, by a bankrupt, does not pass to his assignee, but if he have an interest, or if his trust be coupled with an interest, the assignee in bankruptcy is vested with such interest. *Walker, Ass., v. Seigel & Bott et al.*, 12 N. B. R. 394; 2 Cent. Law J. 508; Fed. Cas. 17,085.

### V. RECOVERABLE BY CESTUI QUE TRUST IN ASSIGNEE'S HANDS.

#### (a) When.

9. The beneficiaries may follow a trust fund into the hands of any one receiving it with notice of the trust. *In re Tesson et al.*, 9 N. B. R. 378; Fed. Cas. 18,844.

10. A *cestui que trust* may recover from the assignee in bankruptcy of the trustee any property into which a portion of the trust fund in the trustee's hands has been converted, so long as the property is distinguishable, such

right only ceasing on failure of means of ascertainment. *Cook et al. v. Tullis*, 9 N. B. R. 433; 18 Wall. 332.

(b) *When Not.*

11. Where trust property does not remain in specie, but has been made way with by the trustee, the *cestui que trust* has no longer any specific remedy against any part of his estate in cases of bankruptcy or insolvency, but must come in *pari passu* with other creditors, and prove against the trust estate for the amount due. In re King, 9 N. B. R. 140; In re Janeway, 4 N. B. R. 26; 18 Pittsb. Leg. J. 67; 4 Brewst. 250; Fed. Cas. 7,208; *Unge- witter v. Von Sachs, Ass.*, 8 N. B. R. 178; 4 Ben. 167; 1 Amer. Law T. Rep. Bankr. 224; Fed. Cas. 14,843; In re Hosie, 7 N. B. R. 601; 5 Leg. Op. 89; Fed. Cas. 6,711.

## VI. IN GENERAL.

12. An arrangement entered into that a partnership may obtain possession of all goods, rights and credits of intestate decedent, and which were assets that the administrator only had the right to hold, is a gross breach of trust. *Forsyth v. Woods*, 5 N. B. R. 78; 11 Wall. 484.

13. A. willed his estate to B, subject to a payment to be made to C, in trust for the benefit of E and F. B. held the property for more than thirty years without ever paying over this sum and then became bankrupt. E and F. claimed the trust fund. *Held*, only an implied or resulting trust and barred by the statute of limitations. In re O'Neale, 6 N. B. R. 425; Fed. Cas. 10,512.

14. When an officer of a corporation without authority executed a deed of trust more than four months before the commencement of proceedings in bankruptcy, but such deed was ratified within such four months, the validity of the deed depends on circumstances existing at time of ratification. In re Kansas City S. & M. Mfg. Co., 9 N. B. R. 76; Fed. Cas. 7,610.

## TRUSTEES (ASSIGNEES).

### I. IN GENERAL.

#### II. ACCOUNTS AND REPORTS.

##### (a) *In General.*

##### (b) *Exemptions.*

### III. COMMON-LAW TRUSTEES.

#### IV. FEES AND COSTS.

#### V. NATURE OF TRUSTEE'S DUTIES.

#### VI. NATURE OF TRUSTEE'S TITLE.

#### VII. PROPERTY GENERALLY VESTING IN TRUSTEE.

#### VIII. POWERS NOT ACQUIRED BY TRUSTEE.

#### IX. REMOVAL OF TRUSTEE.

#### X. RIGHTS ACQUIRED BY TRUSTEE.

#### XI. SUBSTITUTION OF TRUSTEE AS PARTY.

#### XII. SALE BY TRUSTEE.

#### XIII. SELECTION OF TRUSTEE.

##### (a) *In General.*

##### (b) *Appointment.*

##### (c) *Qualifications.*

##### (d) *Who May Vote for.*

#### XIV. SUITS GENERALLY BY TRUSTEE.

#### XV. TITLE NOT ACQUIRED BY TRUSTEE.

#### XVI. TRUSTEE IN RELATION TO.

##### (a) *Fraudulent Conveyances and Preferences.*

##### (b) *General Assignments.*

##### (c) *Mortgages.*

##### (d) *Stockholders.*

##### (e) *Committee of Creditors.*

##### (f) *Usury.*

##### (g) *Waiver of Property.*

See EXECUTION, 19; LIMITATIONS, STATUTE OF, 6, 8, 33, 46, 54; LIEN, 50; MEETING, 3-10, 15, 17; NEGLIGENCE, 1, 2; PARTNERS, 118-128; PETITIONS, 153-155; PLEADING AND PRACTICE, 150, 152, 176, 211, 256, 262, 311; PROOF OF CLAIMS, 32, 52, 62, 69, 70; REFEREE, 45; RENT, 2, 9, 27; SCHEDULE, 47; SECURED CLAIMS, 7; STATUTORY CONSTRUCTION, 63; UNITED STATES, 6.

## I. IN GENERAL.

1. An assignee in bankruptcy should give a separate bond for each case in which he is appointed or elected. In re McFaden, 3 N. B. R. 27; Fed. Cas. 8,785.

2. Eight creditors whose claims amounted to \$9,813.18 voted for the chosen assignee; four creditors whose claims amounted to \$1,127.08 voted for D. for assignee, and three creditors whose claims amounted to \$6,652.95 did not vote. Upon an application that security be required of the assignee, *held*, that a bond in a reasonable penalty should be required. In re Fernberg et al., 2 N. B. R. 114;

1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 4,743.

3. While an assignee can only be represented in the proceedings by his duly appointed attorney, yet another attorney may appear in court as the assignee's counsel in a particular proceeding, as provided in the Oregon Civil Code. In re Comstock et al., 13 N. B. R. 193; 3 Sawy. 517; 8 Chi. Leg. News, 82; Fed. Cas. 3,080.

4. Upon the death of an assignee under the act of 1800, the right of action for a debt due to the bankrupt vested in the executor of the assignee. *Richards v. Maryland Ins. Co.*, 8 Cranch, 84.

5. A discharged bankrupt entered into an agreement with his creditors as to the disposal of his property among them, as the culmination of a suit brought after adjudication, which agreement was not signed by the assignee. *Held*, the agreement was not binding on the estate for want of the assignee's signature, and because the bankrupt was *civilitur mortuus*. In re Anderson, 9 N. B. R. 360; 2 Hughes, 378; Fed. Cas. 351.

6. It is not necessary that the application of an assignee for the appearance of the bankrupt be made under oath. In re McBrien, 2 N. B. R. 73; 2 Ben. 513; Fed. Cas. 8,665.

7. When a suit is brought by a bankrupt with the consent of the trustee in bankruptcy, the verdict, if in favor of the plaintiff, need not be for the use of the trustee. *Southern Express Co. v. Connor*, 12 N. B. R. 58.

8. If, after notice, the assignee permits a pending suit to proceed in the name of the bankrupt, he is bound by the judgment. *Thatcher v. Rockwell*, 105 U. S. 467.

9. If an assignee, with reason to believe that one claiming to be a creditor of the bankrupt had fraudulently proved a debt against the estate, had neglected to contest it, there is nothing to prevent the creditors taking an appeal on the assignee's refusal. *First Nat. Bank v. Cooper et al.*, 9 N. B. R. 529; 20 Wall. 171.

10. The acts of an assignee in bankruptcy cannot be impeached collaterally in the state courts. *Morris et al. v. Swartz*, 10 N. B. R. 305.

## II. ACCOUNTS AND REPORTS.

### (a) *In General.*

11. Upon certificate from the register, *held*, that the register has no power, on the application of creditors, to issue a summons for the examination of a trustee appointed under the bankrupt act, or for the production by him of books and vouchers. In re Hicks et al., 19 N. B. R. 449; Fed. Cas. 6,457.

12. Upon certificate from the register, *held*, that the trustee can only be called to account by a petition to court setting forth the grounds. *Id.*

13. After an assignee's account had been approved, a creditor moved to set aside the confirmation, and examine the conduct of the assignee in selling the bankrupt's property. *Held*, that he was entitled to an investigation. In re Peabody, 16 N. B. R. 248; 9 Chi. Leg. News, 248; Fed. Cas. 10,866.

14. Creditors are not bound to object to the assignee's account save at a meeting called pursuant to the provisions of the act. In re Clark, 9 N. B. R. 67; Fed. Cas. 2,810.

15. An assignee must make his return when requested by the bankrupt, when he has in fact not received or paid any moneys on account of the estate, even though he may have reason to believe that he will thereafter receive moneys on account of the estate. In re Hughes, 1 N. B. R. 9; 2 Ben. 85; 1 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 6,841.

16. The creditors of the partnership elect the assignee, but he becomes the assignee of the estate of the individuals as well as of the firm. He must keep a separate account of the stock of the copartnership and of the individual estate of each member, but the expenses are taken out of the property received by the assignee without reference to whether it was collected from the partnership or the separate estate. *Atkinson v. Kellogg*, 10 N. B. R. 535; 7 Chi. Leg. News, 9; Fed. Cas. 618.

### (b) *Exemptions.*

See EXEMPTIONS, 62.

17. Rule 19, under the act of 1867, requiring assignees to make a report to the court within twenty days after receiving the articles set off to the bankrupt, is to be observed

in all ordinary cases, but it is to receive such a construction as to prevent injustice. Where the property has not come into the possession of the assignee, and a question as to his right is pending in court, the time should be computed from the date of the final decision of the court. In *re Shields*, 1 N. B. R. 170; 15 Pittsb. Leg. J. (O. S.) 391; Fed. Cas. 12,785.

18. A bankrupt who has not complied with the requirements of the state exemption law is not entitled to the benefits thereof, and if the assignee fails to charge himself with property illegally claimed to be exempt his accounts may be excepted to by creditors. In *re Jackson et al.*, 2 N. B. R. 158; Fed. Cas. 7,127.

19. A schedule of property set aside for the bankrupt under the exemption laws was prepared by the register. *Held*, that it was the duty of the assignee to set aside the property to be exempted without interference of the register. In *re Peabody*, 16 N. B. R. 243; 9 Chi. Leg. News, 243; Fed. Cas. 10,866.

20. Where creditors claim that unauthorized exemptions are attempted to be made by the assignees they must except to his report, but as to real estate the attempt is void and no title passes. In *re Gainey*, 2 N. B. R. 163; Fed. Cas. 5,181.

21. The only relation sustained by an assignee to a bankrupt is to set aside the exempt property; in other respects he is the agent of the law for the benefit of creditors. *Aiken v. Edrington, Sr., et al.*, 15 N. B. R. 271; Fed. Cas. 111.

### III. COMMON-LAW TRUSTEES.

22. The trustee of a bankrupt corporation who as a creditor has proved his debt cannot be deprived of his right to share in the dividends merely because he has rendered himself individually liable for the debts of said corporation. *Bristol, Ass., v. Sanford*, 13 N. B. R. 78; 12 Blatchf. 341; Fed. Cas. 1,893.

23. Where a mortgage trustee who had appeared and submitted to a receiver of the estate resigned his trust *pendente lite*, it is unnecessary for his successor to file an original bill of foreclosure. *Sutherland et al. v. Lake Sup. S. C., R. & I. Co.*, 9 N. B. R. 298; 1 Cent. Law J. 127; Fed. Cas. 13,643.

24. Where a note is held by one as trustee for another, it must be proved by the holder *as trustee*, or by the real owner. *Ex parte Dreyfus*, 13 N. B. R. 43; 2 Lowell, 805; 1 N. Y. Wkly. Dig. 296; Fed. Cas. 8,043.

25. A provision in a deed of trust empowering the *cestui que trust* to appoint a new trustee upon the failure of the original trustee to act does not authorize the assignee of the *cestui que trust* to appoint, such power being a personal trust in the *cestui que trust*. *Clark et al. v. Wilson et al.*, 16 N. B. R. 358.

26. A executed a deed conveying land to B. in trust to secure a debt he owed C. The deed contained a clause empowering C. to appoint a new trustee in case B. failed to act. C. becoming bankrupt, his assignees appointed D. as trustee, who sold the land under the terms of the deed. *Held*, that the power to appoint a new trustee did not pass to the assignee. *Id.*

### IV. FEES AND COSTS.

See COSTS AND FEES, 2, 90, 94.

27. In a case so doubtful that a judicial investigation is necessary, the assignee is entitled to his commission in preference to one who has obtained judgment against him for a wrongful conversion. In *re Oberhoffer*, 17 N. B. R. 546; 9 Ben. 485; Fed. Cas. 10,396.

28. The purpose of the amendment to General Order No. 30 under the act of 1867 was not to reform the compensation to assignees in all cases. It intended to provide for a small class of cases where a special inadequacy of compensation appears and great care is shown. In *re Many et al.*, 17 N. B. R. 429; 9 Ben. 160; Fed. Cas. 9,053.

29. Upon the register certifying into court the claim of an assignee for a per diem, *held* that, to entitle the assignee to the same, he must show he actually spent the number of days in attention to his trust, and also the necessity for such attention. In *re Jones*, 9 N. B. R. 491; Fed. Cas. 7,451.

30. Under section 28 of the act of 1867, the assignee, if not in funds from the estate at any time to a sufficient extent to defray the expenses for the further execution of his trust, may require that the funds for that purpose shall be advanced or secured to him before he proceeds further. In *re Hughes*, 1



N. B. R. 9; 2 Ben. 85; 1 Amer. Law T. Rep. Bankr. 45; Fed. Cas. 6,841.

31. An assignee is not allowed to charge the estate of the bankrupt for professional and clerical services until they shall be allowed by the court. *In re Noyes*, 6 N. B. R. 277; Fed. Cas. 10,371.

32. An assignee in bankruptcy, being the trustee of an express trust, is not personally liable for costs in a state court, notwithstanding his being an officer of another court prevents the funds in his hands being attached by the state court. *Reade et al. v. Alerhouse et al.*, 10 N. B. R. 277.

33. When a bill is filed by an assignee without sufficient cause, yet, if there is no imputation of bad faith on the part of the assignee in prosecuting the suit, the costs will be charged against the bankrupt's estate. *Coxe v. Hall*, 8 N. B. R. 562; 10 Blatchf. 56; 21 Pittsb. Leg. J. 77; Fed. Cas. 3,310.

34. The charge of counsel fees to an assignee will not in general be allowed prior to his appointment. Where two assignees were appointed jointly, a charge for professional services by the son of one of them was disallowed. *In re N. Y. Mail S. S. Co.*, 2 N. B. R. 137; 1 Chi. Leg. News, 210; Fed. Cas. 10,210.

35. Assignees under state laws cannot receive allowances for attorney's fee, nor compensation for their own services, when the debtor has been adjudged a bankrupt. *In re Cohn*, 6 N. B. R. 379; Fed. Cas. 2,966.

## V. NATURE OF TRUSTEE'S DUTIES.

See CLAIMS, 34.

36. An assignee represents the rights of creditors as well as the rights of the bankrupt. *In re Wynne*, 4 N. B. R. 5; Chase, 227; 2 Amer. Law T. Rep. Bankr. 116; Fed. Cas. 18,117.

37. The assignee, under the act of 1867, while in some respects a representative of the bankrupt, is, as to the property of the bankrupt and its administration, primarily a representative of the creditors. *Edmonson v. Hyde*, 7 N. B. R. 1; 2 Sawy. 205; 5 Amer. Law T. Rep. (U. S. Cts.) 380; Fed. Cas. 4,285.

38. The adjudication of bankruptcy is in the nature of a statutory execution for all creditors, and the assignee, as their representative, may enforce against the debtor

every right a judgment creditor could enforce. *Barnewall et al., Ass., v. Jones et al.*, 14 N. B. R. 278; Fed. Cas. 1,027.

39. The assignee of a bankrupt corporation does not represent the creditors in their right to proceed against a trustee of said corporation who has rendered himself personally liable for its debts by having signed a false report. *Bristol, Ass., v. Sanford*, 14 N. B. R. 78; 12 Blatchf. 341; Fed. Cas. 1,893.

40. The assignee is the agent and representative of the creditors by statutory appointment. The general creditors have no power to act except to vote on the selection of an assignee and on the subject of dividends. *In re Campbell*, 17 N. B. R. 4; 8 Hughes, 276; Fed. Cas. 2,348.

41. It is the duty of the assignee to appear before the register without notice where the proceedings before the register have been instigated by the assignee; and where he was present in fact, it does not lie in his mouth to say he was not summoned. *Id.*

42. If ordered by the court, trustees may settle the bankrupt's estate as if no adjudication had been made, and the bankrupt's estate were under his own management. *In re Darby*, 4 N. B. R. 61, 98; 18 Pittsb. Leg. J. 154; Fed. Cas. 3,570.

43. When sufficient goods remain on the premises occupied by the bankrupt to satisfy rent on distress, the assignee should pay the full amount due up to the surrender of the premises to the landlord. *Longstreth, Ass., v. Pennock*, 7 N. B. R. 449; 9 Phila. 394; 20 Pittsb. Leg. J. 107; Fed. Cas. 8,488.

44. Funds recovered by the assignee in bankruptcy must be distributed among all the creditors and not given to one, although his claim be for consigned goods. *White v. Jones*, 6 N. B. R. 175; Fed. Cas. 17,550.

45. An assignee may be required to testify as any other witness, and the register has authority to make the requisite order. An assignee is not subject to an examination by any creditor whenever the latter may desire it, but will be protected from unnecessary annoyance, by refusing an application for his examination unless upon some issues referred to the register. *In re Smith*, 14 N. B. R. 492; Fed. Cas. 12,988.

46. The register has the power to order the assignee to furnish all necessary informa-

tion as to the funds in his hands. In re Clark et al., 6 N. B. R. 194; Fed. Cas. 2,807.

47. A claim allowed by the register before the appointment of the trustees, if the trustees so elect, can on notice to the claimants be opened and passed upon anew by the register. Where trustees are satisfied a demand is correct they can allow it. They can dispose of assets and settle the estate without special orders; keep their own accounts and records; have the aid of the register or judge when needed, and finally have their actions closed by the formal decree of the court. In re Darby, 4 N. B. R. 98; 4 N. B. R. 61; 18 Pittsb. Leg. J. 154; Fed. Cas. 3,570.

48. Assignee is an officer of the court and acts subject to its orders. The bankrupt is entitled to a certificate of the assignee giving the names and residences of creditors who have proved claims. Motions to compel the assignee to do his duty are properly made before the register. In re Blaisdell et al., 6 N. B. R. 78; 5 Ben. 420; 42 How. Pr. 274; Fed. Cas. 1,488.

49. Proper notice must be given by the assignee to all creditors, and the register should see that this duty is performed. Its non-performance renders the bankrupt liable to lose his right to a discharge. In re Bushey, 8 N. B. R. 167; 27 Leg. Int. 111; Fed. Cas. 2,227.

50. When an assignee has accepted his appointment and given bonds, his neglect to take into his custody the deed of assignment and have the same recorded, knowing that no property passed by the assignment, is no ground for withholding a discharge. In re Pierson, 10 N. B. R. 107; Fed. Cas. 11,153.

## VI. NATURE OF TRUSTEE'S TITLE.

51. The assignee's title to the property of the bankrupt vests by relation to the commencement of the proceedings in bankruptcy, although the property was then attached on mesne process, served within four months before, as the property of the debtor. Conner v. Long, 104 U. S. 228; Chapman v. Brewer, 114 id. 158; International Bank v. Sherman, 101 id. 408.

52. The conveyance of land by a bankrupt to his assignee passes to the latter only such interest as the former has, and if the bank-

rupt buys the land subsequently from the assignee, he purchases only such interest as he could rightfully have conveyed originally to his assignee. Roby v. Colehour, 146 U. S. 153.

53. The assignee takes as a purchaser from the bankrupt with notice of all outstanding rights and equities as to everything except fraudulent conveyances and preferences in fraud of the bankrupt law. Dudley v. Easton, 104 U. S. 99.

54. The assignee in bankruptcy represents the unsecured or general creditors. He is in no sense the agent or representative of secured creditors who do not prove their claims. Id.

54a. The title of an assignee in bankruptcy is paramount to that of a receiver appointed by a state court, although the receiver be appointed prior to the filing of the petition in bankruptcy. Smith v. Buchanan et al., 4 N. B. R. 132.

55. Trustees have no judicial authority, and, where such is needed, they must resort to it just as the bankrupt would have been compelled to do if no proceedings had been instituted. In re Darby, 4 N. B. R. 61, 98; 18 Pittsb. Leg. J. 154; Fed. Cas. 3,570.

56. An assignee in bankruptcy is only a trustee, an agent, standing in the shoes of the bankrupt, with power to do what the bankrupt ought to have done, namely, pay the debts out of the assets. Starkweather v. The Cleveland Ins. Co., 4 N. B. R. 110; 2 Abb. (U. S.) 67; 3 Chi. Leg. News, 77; 28 Leg. Int. 36; 10 Amer. Law Reg. (N. S.) 333; 5 Amer. Law Rev. 568; Fed. Cas. 13,308.

57. The assignee has all the rights and powers which are given to the whole body of creditors whether at law or in equity. Wilkins v. Davis, 15 N. B. R. 60; 3 Lowell. 511; Fed. Cas. 17,664.

58. An assignee stands in the place of the bankrupt and is remitted to all his rights of property at the time he was adjudged bankrupt. Randolph et al. v. Canby, Ass., 11 N. B. R. 296; Fed. Cas. 11,559.

59. If the assignee in bankruptcy has any power over a subject, it must be found in the bankrupt law itself. Dutcher, Ass., v. The Mar. Nat. Bank et al., 11 N. B. R. 457; 12 Blatchf. 435; Fed. Cas. 4,208.

60. The assignee becomes vested with all the estate of the bankrupt not exempt, and

must be considered in the light of a purchaser. *Bromley, Ass., v. Smith et al.*, 5 N. B. R. 152; 2 Biss. 511; 3 Chi. Leg. News, 297; Fed. Cas. 1,922.

60a. An assignee of a corporation, appointed under the bankrupt laws of the United States, represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him. *Chubb v. Upton, Ass.*, 16 N. B. R. 537; 95 U. S. 665.

61. The bankrupt act does not confer on the assignee the rights of a judgment creditor. *Cook v. Waters et al.*, 9 N. B. R. 155.

62. An assignee occupies the place of the debtor, and is invested with his rights, subject to all the equities which would have affected them if he had not become bankrupt. *Purviance v. Union Nat. Bank*, 8 N. B. R. 447; 30 Leg. Int. 352; 21 Pittsb. Leg. J. 33; Fed. Cas. 11,475.

63. The appointment of an assignee in bankruptcy relates back, and gives him title to the estate, real and personal, legal and equitable rights, interests and things in action which belong to the debtor on the filing of the petition. *Smith v. Buchanan et al.*, 4 N. B. R. 138; 8 Blatchf. 153; 3 Alb. Law J. 97; Fed. Cas. 13,016.

64. An assignee is an officer of the court, and is strictly limited to the powers conferred by the act and the orders of the court. Any agreement made by him in violation thereof is void. *In re Ryan & Griffin*, 6 N. B. R. 235; Fed. Cas. 12,182.

## VII. PROPERTY GENERALLY VESTING IN TRUSTEE.

See ATTACHMENT, 15, 18; CONFLICT OF LAWS, 18; COURTS, 26; ESTATES, 17, 61, 62, 83, 104, 121, 165, 213.

65. The right of the assignee to maintain an action does not depend on the instrument of assignment, as the act provides that all choses in action, debts due, etc., shall, in virtue of the adjudication and appointment of the assignee, vest at once in him. *Zantzing v. Ribble, Ass.*, 4 N. B. R. (3 vo. ed.) 724.

66. Where a creditor obtained judgment for a debt not yet payable and thereby obtained a lien by levy, *held*, the lien was invalid against the assignee in bankruptcy.

*Partridge v. Dearborn et al.*, 9 N. B. R. 474; 2 Lowell, 286; Fed. Cas. 10,785.

67. If the debtor's property levied on under an attachment within four months previous has been sold prior to the filing of the petition in bankruptcy, the assignee's rights attach to the money and cannot follow the property sold. *Conner v. Long*, 104 U. S. 228.

68. An assignee of a bankrupt firm takes by his assignment all the property of the firm and of the individual members thereof. *In re Leland et al.*, 5 N. B. R. 222; 5 Ben. 168; Fed. Cas. 8,228.

69. A petition by the assignee to the bankrupt court prayed that the claim of a bank be expunged and certain securities be delivered to him. *Held*, that the claim on a certain extended note on which the bankrupt was indorser might be expunged. *In re Granger et al.*, 8 N. B. R. 30; Fed. Cas. 5,684.

70. An assignee should show some right to the property in controversy in order to make him a party. Conversion by his principal is not of itself a good reason for supposing he has a right to the property in question. *In re Gunther et al.*, 3 N. B. R. 179.

## VIII. POWERS NOT ACQUIRED BY TRUSTEE.

See ESTATES, 286.

71. An assignee cannot attack the trust he assumed to execute and defend. *Johnson, Ass., v. Rogers et al.*, 15 N. B. R. 1; 5 Amer. Law Rec. 536; 14 Alb. Law J. 427; Fed. Cas. 7,408.

72. The assignee who had contracted for the manufacture of and received pay for an article is estopped to deny that an article of the kind contracted for, in the possession of the bankrupt at the time of the adjudication, is the one paid for. *Ex parte Rockford, Rock Island & St. Louis R. R. Co.*, *In re McKay et al.*, 3 N. B. R. 12; 1 Lowell, 345; 2 Amer. Law T. 105; 1 Chi. Leg. News, 337; 1 Amer. Law T. Rep. Bankr. 183; Fed. Cas. 11,978.

73. The laws give the assignee no power to become defendant to a suit in another court than the bankrupt court, commenced after the adjudication. *In re Anderson*, 9 N. B. R. 360; 2 Hughes, 378; Fed. Cas. 351.

74. Judgment creditor's claim was objected to on the ground that the judgment was for a debt procured by fraud on the bankrupt and had been secured by default. *Held*, that the assignee could not set up such defense. It should be set up at the trial when the judgment was had. *Stillwell v. Walker*, Ass. etc., 17 N. B. R. 569; 6 Cent. Law J. 406; Fed. Cas. 13,451.

75. An attorney agreed with the assignee to conduct a suit on a contingent fee. He collected the money and retained the fee agreed upon. Upon motion to require the attorney to pay over a portion of the money retained, *held*, that the assignee had no power, without permission of court, to make such an agreement. In re *Brinker et al.*, 19 N. B. R. 195; Fed. Cas. 1,882.

76. An assignee acquires no rights under the agreement made by a third person to sell property to the bankrupt only on certain conditions as to payment, where, before filing the petition, the bankrupt had wholly failed to perform the conditions. *Norton v. Hood*, 124 U. S. 20.

77. The bankrupt act does not grant to the assignee any power to institute proceedings for the recovery of a statute forfeited, and claimed by the bankrupt either prior or subsequent to proceedings against him in bankruptcy. *Bromley, Ass., v. Smith et al.*, 5 N. B. R. 152; 2 Biss. 511; 3 Chi. Leg. News, 297; Fed. Cas. 1,922.

78. An assignee in bankruptcy has no right to examine the bankrupt after his discharge from his debts and liabilities provable under the bankrupt act. In re *Witowski*, 10 N. B. R. 209; Fed. Cas. 17,920.

79. An assignee cannot require a creditor either to retain or give up a policy of insurance upon the life of the bankrupt held by him as collateral security and withdraw his proof of claim. In re *Newland*, 7 N. B. R. 477; 6 Ben. 342; Fed. Cas. 10,170.

## IX. REMOVAL OF TRUSTEE.

See COURTS, 48.

80. Though the facts disclosed may justify the removal of an assignee, he cannot be removed except upon application made for this purpose to the court. In re *Schaper*, 9 N. B. R. 324; Fed. Cas. 12,438.

81. An assignee having applied to the

court for directions, and a reference being ordered to obtain the information upon which to base the direction, the assignee failed to attend the reference, but acted independently. *Held*, that he be held to the strictest account. *Id.*

82. Where an assignee has been chosen by creditors on the first warrant, notice of an application to remove him should be given so that all creditors that have proved their debts may be heard. In re *Perry*, 1 N. B. R. 2; 1 Amer. Law T. Rep. Bankr. 4; Fed. Cas. 10,998.

83. The petitioner for a review of an order of the district court denying the application for removal of an assignee had become the sole creditor. *Held*, that the estate should be transferred to such assignee as he and the bankrupt should name, the former assignee to receive his commissions. In re *Sacchi*, 6 N. B. R. 497; 10 Blatchf. 29; 4 Chi. Leg. News, 289; 43 How. Pr. 252; Fed. Cas. 12,200.

84. Application was made for the removal of the assignee, on the ground that he had not filed a bond and had been disposing of the estate before the composition payments were made. *Held*, that the assignment was not affected by what had taken place, and that the assignee must file his bond or be removed. In re *Leipziger*, 18 N. B. R. 264.

85. A., who stated that he proposed seeking out creditors, and soliciting them to prove their debts and vote for him as assignee, was by such means elected in a number of cases. *Held*, that the elections must be disapproved. In re —, a Bankrupt, 2 N. B. R. 100.

86. Matters arising from the election of an assignee in bankruptcy involve no principle of equity unless fraud is alleged, and as district courts are vested with large powers in reference to the appointment and removal of assignees, the circuit court will not interfere. *Woods et al. v. Buckewell et al.*, 7 N. B. R. 405; 2 Dill. 38; 6 Alb. Law J. 291; Fed. Cas. 17,991.

87. A motion to set aside the appointment of the assignee can be entertained by the district judge, upon notice, and not by the register. In re *Stokes*, 1 N. B. R. 130; 1 Amer. Law T. Rep. Bankr. 122; Fed. Cas. 13,475.

88. At the first meeting of creditors, objection was made to the assignee proposed by the petitioning creditor, whereupon an

adjournment was had. At the adjourned meeting the objecting creditors did not appear, and the register reported that no objection was made. *Held*, that the former objections remained in force, and the appointment was vacated. *In re Norton*, 6 N. B. R. 297; Fed. Cas. 10,348.

89. A petition was filed against an assignee to have him removed for the reason that he attacked two mortgages upon the bankrupt's property without sufficient cause, and that he delayed a sale for the purpose of obtaining the rents in order to spend them in liquidation. *Held*, that the assignee was justified in his attack upon the mortgages, and that there was no evidence to show that he collected any rents, or how much he has spent in litigation. *In re Sacchi*, 6 N. B. R. 398; 43 How. Pr. 250; Fed. Cas. 12,201.

90. The creditors having knowledge of the action of an assignee in soliciting his own election, and permitting him to qualify and act for six months without objection, it is too late to ask his removal on that ground. *In re Mallory*, 4 N. B. R. 38; Fed. Cas. 8,990.

91. It is wrong to allow the bankrupt to select his assignee. Such an assignee might favor the bankrupt at the expense of the creditors' interests. *Id.*

92. The bankrupt act gives the court power to remove an assignee for any cause which renders such removal necessary or expedient. The removal of the assignee is a matter left to the discretion of the court. *Id.*

93. An election of a near relative of the bankrupt as assignee will be set aside, and the appointment by the register will be confirmed. *In re Zinn et al.*, 4 N. B. R. 123; 40 How. Pr. 461; Fed. Cas. 18,216.

94. The right of creditors to choose one or more assignees, or trustees, at the first meeting cannot be denied; and after an assignee has been appointed he may be removed and trustees appointed in his stead. *In re Jones*, 2 N. B. R. 20; Fed. Cas. 7,447.

95. Upon a creditor's petition for removal of the assignee, *held*, that as the assignee had neglected to secure the bankrupt's property, and had shown gross neglect, he should be removed and required to pay the costs of the petition out of his own funds. *In re Morse*, 7 N. B. R. 56; Fed. Cas. 9,852.

96. An assignee of a bankrupt who has a

large deposit with a bank which bought up claims against the bankrupt's estate at a discount, to set off against such deposit, and who has knowledge of the facts and does not disclose them to other creditors, nor dispute such claims for a set-off, does not perform his duty, and should be removed. *In re Perkins*, 8 N. B. R. 56; 5 Biss. 254; Fed. Cas. 10,982.

97. Where it appeared that a majority of creditors in number and value had duly voted to remove the assignee, but that the creditors were few, and several of them voting for the removal were parties to mortgages and other transactions which the assignees were seeking to impeach, and no money remained in the hands of the assignee, and nothing remained to be done excepting to settle those disputes, the court refused to remove the assignee. *In re Dewey*, 4 N. B. R. 139; 1 Lowell, 493; Fed. Cas. 3,849.

98. Where an assignee fails to deposit funds belonging to the estate of which he is assignee, and where he suffers a foreclosure of a mortgage, and neglects to purchase it at less than its face, and where he is guilty in the same manner as to a judgment, pays money to satisfy the judgment, pays seven per cent. interest out of the estate, and, at the same time, loans the moneys belonging to the estate at six per cent., and fails to comply with the directions of the register, he will be ordered to show cause why he should not be removed, and the register certifying such neglect of duty will be directed to employ counsel to represent the estate. *In re Price*, 4 N. B. R. 137; Fed. Cas. 11,409.

99. If a creditor, who has been included by an amended schedule, after proving his claim, wishes to have the assignee removed, he can petition the court in accordance with form 40 under the act of 1867. *In re Carson*, 5 N. B. R. 290; 5 Ben. 277; Fed. Cas. 2,460.

100. The removal of an assignee rests in the discretion of the court, but it is a legal discretion, and cause must be shown to render the removal expedient. *In re Blodgett et al.*, 5 N. B. R. 472; Fed. Cas. 1,552.

101. A court has power to set aside a discharge of an assignee and to direct the assignee to proceed with his duties, when it appears that such discharge has inadvertently found its way among the files of the

court. *Maybin v. Raymond, Ass.*, 15 N. B. R. 353; 4 Amer. Law T. Rep. (N. S.) 21; Fed. Cas. 9,338.

102. Where an assignee's discharge was improperly made and is set aside, and the assignee is directed to proceed, claims may be proved subsequent to such discharge. In re *Maybin*, 15 N. B. R. 468; Fed. Cas. 9,387.

## X. RIGHTS ACQUIRED BY TRUSTEE.

See APPEALS AND WRITS OF ERROR, 8; ARBITRATION, 1; COLLATERAL ATTACK, 14.

103. An assignee in bankruptcy may be heard as well as the bankrupt in a case where the bankrupt is allowed to bring error on a matter affecting provable claims before the assignee. *Hill v. Harding*, 107 U. S. 631.

104. When the right of a state court to proceed in a suit is subject to be impeached, it can only be done by the assignee. *Valiant, Ass., v. Childress*, 11 N. B. R. 317; 21 Wall. 642.

105. The privilege of an assignee in bankruptcy from being cited in proceedings in a state court can only be set up by the assignee himself or by some person claiming under him, and not by one claiming under a conveyance from the bankrupt before the bankruptcy. *Ludeling v. Chaffe*, 143 U. S. 301.

106. One partner filed a petition, but the other partners denied bankruptcy; he was adjudicated, and his assignee petitioned the court to declare the others bankrupt. *Held*, that the assignee had properly instituted the proceedings. *Grady et al. v. Heath*, 8 N. B. R. (8 vo. ed.) 227; Fed. Cas. 5,654.

107. An assignee in bankruptcy has the right to move for a dissolution of an attachment, and it is not proper to put him on terms in this respect. *King v. Loudon, Ass.*, 14 N. B. R. 383.

108. Where personal property of a bankrupt has been attached, the assignee can take advantage of any remedy which would have been open to a subsequent attaching creditor, since the assignee represents the creditors as well as the bankrupt himself. *Beers v. Place et al.*, 4 N. B. R. 150; 36 Conn. 578; 4 Amer. Law T. 186; 1 Amer. Law T. Rep. Bankr. 262; Fed. Cas. 1,233.

## XI. SUBSTITUTION OF TRUSTEE AS PARTY.

See ATTACHMENT, 5.

109. Where one who files a petition in bankruptcy against another is himself adjudged a bankrupt, his assignee is properly substituted as petitioner in his place. In re *Jones*, 7 N. B. R. 506; Fed. Cas. 7,450.

110. Where there is a co-assignee, and the assignee plaintiff has absconded, it is not proper to proceed further with the suit until proper proceedings are taken, on notice to the co-assignee, to compel him to elect whether he will or not be made a party plaintiff to the suit and become responsible for its conduct. *Fenton, Ass., v. Colterd*, 11 N. B. R. 535; 8 Ben. 27; Fed. Cas. 4,731.

111. An assignee in bankruptcy of a plaintiff will not be substituted in the supreme court in place of such plaintiff where the assignee has remained idle and allowed the case to go on in the plaintiff's name at his expense and under his management or that of the creditors for whose use he is prosecuting the same. *United States v. Peck*, 102 U. S. 64.

112. An assignee in bankruptcy may be substituted as appellant in the supreme court where his assignor has received his discharge in bankruptcy after the case was brought up. *Gates v. Goodloe*, 101 U. S. 612.

## XII. SALE BY TRUSTEE.

See SALES, 30, 104.

113. An assignee can transfer only such title as he may possess. *Second Nat. Bank v. National State Bank*, 11 N. B. R. 49.

114. A purchaser of a claim from an assignee in bankruptcy takes only his rights. *Crawford v. Halsey*, 124 U. S. 658; *Wisner v. Brown*, 122 id. 214.

115. If an assignee make a sale of property, but refuse to deliver possession, he is liable to an action at law if the sale has never been brought to the attention of the bankrupt court. *Ives et al. v. Tregent*, 14 N. B. R. 60.

116. An assignee, directed by the court to sell certain goods at the highest price he could obtain, received an offer which was

higher than one for which he had promised to sell. He refused to entertain the higher price. *Held*, that he should have rejected the first when the higher price was offered. In *re* Ryan et al., 6 N. B. R. 235; Fed. Cas. 12,182.

117. The assignee may, if to the interest of the estate, relieve the property from a lien by discharging the incumbrance, or he may agree with the creditors as to the value of the property, or it may be ascertained by a sale, when the creditor shall only be such for the balance. *Reed v. Bullington*, 11 N. B. R. 408.

118. The assignee must sell the property of the bankrupt himself. When an auctioneer is employed the assignee must show affirmatively the necessity of such employment or the auctioneer's charges will not be allowed in his account. In *re* Sweet et al., 9 N. B. R. 48; 21 Pittsb. Leg. J. 82; Fed. Cas. 13,688.

119. The assignee should sell the property of the bankrupt subject to an incumbrance or seek to have it sold free from the incumbrance as he thinks the interests of the creditors will be best served. In *re* McClellan, 1 N. B. R. 91; 1 Amer. Law T. Rep. Bankr. 48; Fed. Cas. 8,694.

120. The right to a homestead exemption is not lost by the delay of the husband to claim it until an order has been applied for by the assignee in bankruptcy to sell the property. *Bartholomew, Ass. v. West et al.*, 8 N. B. R. 12; 2 Dill. 290; 7 West. Jur. 441; Fed. Cas. 1,071.

121. The assignee in bankruptcy of a manufacturing corporation having sold a large amount of real estate for what seemed to be an inadequate price to a combination of creditors, the other creditors not having any notice of the time and place of sale, such sale was set aside. In *re* Troy Woolen Co., 4 N. B. R. (8 vo. ed.) 629; 8 Blatchf. 465; Fed. Cas. 14,201.

122. Where the assignee was not made a party to partition proceedings of real estate he may sell the bankrupt's undivided interest therein. *Smith v. Sholtz et al.*, 17 N. B. R. 520.

123. If an assignee desires to settle a controversy or to have property sold as perishable or because the title is in dispute, he must apply to the court by petition. In *re* Graves, 1 N. B. R. 19; 2 Ben. 100; Fed. Cas. 5,709.

124. An assignee cannot make up out of the general funds of the estate the difference between the net proceeds of the sale of mortgaged property and the amount stated by the mortgage as due to the mortgagee. In *re* Purcell et al., 2 N. B. R. 10; 2 Ben. 485; 36 How. Pr. 42; Fed. Cas. 11,469.

125. A trustee cannot, as a member of a copartnership, purchase at a sale wherein he as trustee sells. *Lockett v. Hoge*, 9 N. B. R. 167; Fed. Cas. 8,444.

126. An improper conveyance was made by an assignee in collusion with the purchaser. On the conveyance being set aside, the purchase-money was not refunded to the purchaser on his petition. In *re* Mott, 1 N. B. R. 9; Fed. Cas. 9,879.

### XIII. SELECTION OF TRUSTEE.

#### (a) *In General.*

127. A meeting to prove debts and choose an assignee should be organized at the hour designated in the official notice and should be kept open until an assignee is chosen. In *re* Phelps et al., 1 N. B. R. 139; Fed. Cas. 11,071.

128. A bankrupt had been a member of a firm which was dissolved some months before the bankruptcy. An assignee was chosen by separate creditors. The choice of assignee was confirmed. In *re* Falkner, 16 N. B. R. 503; Fed. Cas. 4,624.

129. The court will not sanction the practice of soliciting votes of creditors by one seeking to be assignee, especially when one is a stranger to the creditors and makes it a regular business to seek out creditors. In *re* Doe, 2 N. B. R. (8 vo. ed.) 806; 1 Chi. Leg. News, 123; Fed. Cas. 3,957.

130. The court will not set aside an election of an assignee on account of any irregularity in admitting a claim, when its exclusion would not affect the result. In *re* Jackson et al., 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

#### (b) *Appointment.*

See DEATH, 5.

131. Where no creditors attend on the day fixed for the first meeting the register may appoint an assignee. In *re* Cogswell, 1 N. B.

R. (8 vo. ed.) 62; 1 Ben. 388; Bankr. Reg. Supp. 14; 14 Pittsb. Leg. J. 616; 6 Int. Rev. Rec. 85; Fed. Cas. 2,959.

132. An additional assignee may be appointed to act in conjunction with one previously appointed, upon petition to the court showing a sufficient reason. In re Overton, 5 N. B. R. 366; Fed. Cas. 10,625.

133. A register may appoint an assignee in the event of the failure of the creditors to elect when there is no opposing interest, but any creditor has the right to object to the register making the appointment, in which event the duty of making the appointment devolves upon the judge of the bankrupt court. In re Pearson, 2 N. B. R. 151; 2 Amer. Law T. Rep. Bankr. 66; Fed. Cas. 10,878.

134. At a first meeting of creditors were five related to the bankrupts. Mainly upon this ground, other creditors asked that these claims be inquired into. The register thereupon postponed proof of these claims, and, there being no choice of assignee, appointed one. Objection was made to such postponement and to the proof of another claim by the agent of the creditor, absent in another state. In view of all the facts the appointment of the assignee was confirmed. In re Jackson et al., 14 N. B. R. 449; 7 Biss. 280; Fed. Cas. 7,123.

135. The opposing interest which precludes the register from appointing an assignee is not merely an interest contending by vote, but an interest in opposition to the exercise of the power of appointment by him. *Id.*

136. Assignees are public officers whose appointment must be approved by the judge of the district court. *Morris et al. v. Swartz*, 10 N. B. R. 305.

137. A provisional assignee should not be appointed unless the court is satisfied that it is necessary for the protection of the property and that it will inure to the benefit of the creditors. *M. & M. Nat. Bank v. The Brady's Bend L. Co.*, 5 N. B. R. 491; 19 Pittsb. Leg. J. 5; 3 Chi. Leg. News, 402; 28 Leg. Int. 317; 4 Amer. Law T. 168; 8 Phila. 171; 3 Pittsb. Rep. 326; 1 Leg. Op. 202; 1 Amer. Law T. Rep. Bankr. 272; Fed. Cas. 9,018.

138. An additional assignee may be appointed upon petition to the court showing sufficient reasons, and an application to con-

test a claim against the estate will be allowed upon petition and affidavits. In re Overton, 5 N. B. R. 366; Fed. Cas. 10,625.

139. Although no creditors have proved debts, and there are no assets, an assignee should be appointed. *Anon.*, 1 N. B. R. (8 vo. ed.) 122; Bankr. Reg. Supp. 27; Fed. Cas. 457.

### (c) *Qualifications.*

140. A kinsman of a bankrupt is ineligible as assignee. In re Powell, 2 N. B. R. 17; Fed. Cas. 11,354.

141. The mere fact of relationship on the part of a proposed trustee under the bankrupt act of 1867, to the bankrupt or to a creditor, or to a proposed member of the committee, or on the part of a proposed member of such committee to a creditor or to the bankrupt, cannot be regarded as a disqualification. In re Zinn et al., 4 N. B. R. 145; 4 Ben. 500; 49 How. Pr. 64; Fed. Cas. 18,215.

142. The assignee selected had been for several years the book-keeper of one of the bankrupts. The bankrupt and his attorney attended the meeting of creditors and endeavored to control its action, and both voted under powers of attorney received from different creditors. *Held*, that he was elected in the interest of the bankrupt, and a new election was ordered. In re Wetmore et al., 16 N. B. R. 514; Fed. Cas. 17,466.

143. A director of a bank, for the benefit of which the bankrupt had, before filing his petition, confessed judgment, is ineligible as assignee. In re Powell, 2 N. B. R. 17; Fed. Cas. 11,354.

144. The same person cannot be at the same time a receiver under the state law and a trustee or assignee appointed by the bankrupt court. In re Stuyvesant Bank, 6 N. B. R. 272; 5 Biss. 566; Fed. Cas. 13,581.

145. The person nominated as one of the trustees, under section 43 of the act of 1867, was also the receiver appointed under a state court order. *Held*, he was not eligible. *Id.*

146. A person who has been of counsel for a bankrupt may be appointed assignee, it being understood that he cannot occupy the position of counsel and assignee at the same time. In re Clairmont, 1 N. B. R. 42; 1 Lowell, 230; 1 Amer. Law T. Rep. Bankr. 6; Fed. Cas. 2,781.



147. A corporation holding property in three states was adjudged bankrupt and three assignees were appointed, none of whom was a resident of a certain one of said states. The court, in the district from which no assignee was appointed, declined to approve the election of assignees. In re Boston, H. & E. R. R. Co., 5 N. B. R. 233; Fed. Cas. 1,680.

148. A son of one of the members of a bankrupt firm, who, together with other members of one of the bankrupt's family, present claims against the estate, is not a proper person to appoint as assignee. In re Bogert et al., 3 N. B. R. 161; Fed. Cas. 1,600.

149. An assignee must reside in the district in which the proceedings are being carried on. In re Havens, 1 N. B. R. 126; Fed. Cas. 6,231.

150. The attorney for the creditors may be chosen assignee by the creditors if not otherwise objectionable. In re Lawson, 2 N. B. R. 44; Fed. Cas. 8,150.

151. A person residing without, but having a place of daily business within, the jurisdiction of the bankruptcy court, may be appointed an assignee. In re Loder, 2 N. B. R. 161; 2 Amer. Law T. Rep. Bankr. 89; Fed. Cas. 8,459.

152. An attorney for creditors may be appointed assignee of the bankrupt's estate. In re Barrett, 2 N. B. R. 165; 2 Hughes, 444; 1 Chi. Leg. News, 202; 2 Amer. Law T. Rep. 182; 11 Int. Rev. Rec. 21; 1 Amer. Law T. Rep. Bankr. 144; Fed. Cas. 1,043.

#### (d) *Who May Vote for.*

See CLAIMS, 36, 40; COMPOSITION, 4.

153. Creditors of the firm only can participate in the election of assignees for copartners, and such election must be by a majority in number and value of creditors who have proved their claims (act of 1867). In re Scheiffer et al., 2 N. B. R. 179; 1 Chi. Leg. News, 261; Fed. Cas. 12,445.

154. Efforts of the bankrupt's friends to buy his debts and stop proceedings do not constitute a fraud upon bankrupt act, and constitute no reason for not voting upon the debts for election of assignee. In re Frank, 5 N. B. R. 194; 5 Ben. 164; Fed. Cas. 5,050.

155. Debts proved and filed may be postponed for investigation before the assignee,

and not allowed to be voted upon for assignee. *Id.*

156. A creditor may change his vote before signing the certificate of election of an assignee. In re Pfromm, 8 N. B. R. 357; Fed. Cas. 11,061.

157. The vote of a creditor who votes corruptly should be excluded, but where the result is not affected by such exclusion a new election will be ordered. *Id.*

158. An assignee chosen by the greater part in number and value of the creditors who have proven their claims at the first meeting is assignee by virtue of the law, and the court will not remove him in the absence of any imputation either upon his capacity or integrity. In re Grant, 2 N. B. R. 35; Fed. Cas. 5,692.

159. The vote for assignee should be taken at the earliest practicable moment. Creditors who have proved their claims may postpone such action until others have proved, but they are not compelled to do so. So, if the proofs of claims are postponed by the register, such creditors are not entitled to vote. They may have the proceedings certified to the court, and if the register's rulings were erroneous, the court will set aside the vote and refer the matter back for a new vote, unless it appears that the vote of the complaining creditor would not change the result. In re Lake Sup. S. C., R. and I. Co., 7 N. B. R. 376; Fed. Cas. 7,997.

160. The election of an assignee who promised certain creditors to pay their claims in full in consideration of their giving him powers of attorney to vote for them will be disregarded by the court. In re Haas et al., 8 N. B. R. 189; Fed. Cas. 5,884.

161. In a separate adjudication against a bankrupt who has been a member of a firm, the separate creditors are entitled to vote for assignee. In re Falkner, 16 N. B. R. 503; Fed. Cas. 4,624.

162. When at the first meeting of creditors but one proves his debt, he has the right to choose the assignee. In re Haynes, 2 N. B. R. 78; 1 Gaz. 78; Fed. Cas. 6,269.

163. Creditors who have accepted a composition are not entitled to vote for an assignee. *Ex parte Hamlin*, 16 N. B. R. 320; 2 Lowell, 571; 5 Cent. Law J. 281; Fed. Cas. 5,998.

164. In case of the separate bankruptcy of one member of a firm, a joint creditor is entitled to prove his debt and vote for assignee. *In re Webb*, 16 N. B. R. 258; 4 Sawy. 326; 10 Chi. Leg. News, 27; 5 N. Y. Wkly. Dig. 174; Fed. Cas. 17,817.

165. The managing officers of a corporation, when creditors, have the same rights to vote for assignee as any other claimant. Their debts should be carefully examined by the register, and if he entertains suspicion they should be postponed. In so examining, he should not be called upon to decide doubtful proofs. If the claim cannot be readily explained it should be postponed. *In re Northern Iron Co.*, 14 N. B. R. 356; Fed. Cas. 10,322; R. S. 5083.

166. A secured creditor sold his lien at auction, bid it in himself, and proved his claim for the difference between the face of the claim and the amount bid. He then voted for assignee. *Held*, that he had no right to vote, and that the bankrupt act authorized no such method of ascertaining the value of a security. *In re Hunt*, 17 N. B. R. 205; 35 Leg. Int. 71; Fed. Cas. 6,884.

#### XIV. SUITS GENERALLY BY TRUSTEE.

See SUITS, 16; COURTS, 34, 35, 185, 257; ESTATES, 119, 124, 137.

167. An assignee represents the rights of the creditors as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which, on grounds of public policy or otherwise, he would not be allowed to do. *In re The St. Helen's M. Co.*, 10 N. B. R. 414; 3 Sawy. 88; 3 West. Jur. 597; Fed. Cas. 12,222.

168. A suit may be maintained by an assignee in bankruptcy to collect the assets in district courts other than that where the proceedings are pending. *In re Goodall, Ass.*, 7 N. B. R. 193; 3 Biss. 219; 4 Chi. Leg. News, 473, 485; Fed. Cas. 5,533.

169. It is within the power of congress, in establishing a uniform system of bankruptcy, to provide a uniform rule on the subject of limitation of actions, whether by or against an assignee in bankruptcy, and such rule must necessarily supersede state legislation on the subject. *Peiper v. Harmer*, 5 N. B. R. 252.

170. An assignee may sue or be sued in the state courts, but the act limits the bringing of an action to two years from the time the cause of action accrued. *In re Cogdell, Ass.*, 10 N. B. R. 327.

171. An assignee's failure to sue within two years given by law does not transfer a right of action to a creditor. *Trimball v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301.

172. In an action by the assignee in a state court he need not establish the jurisdiction of the bankruptcy court. If he shows the adjudication, his appointment as assignee and the assignment to him of the bankrupt's estate, it is sufficient. *Cone, Ass. v. Purcell*, 11 N. B. R. 490.

173. Federal courts may decline to entertain actions brought by assignees for less than \$500 in amount. *Wente v. Young et al.*, 17 N. B. R. 90.

174. An assignee brought suit in equity to obtain possession of a vessel on the ground that he was unable to give the bond required in an action of replevin. *Held*, that the remedy is at law. *In re The Oregon I. Works*, 17 N. B. R. 404; 4 Sawy. 169; 26 Pittsb. Leg. J. 3; Fed. Cas. 10,562.

175. An assignee may sue on a written contract entered into between the bankrupt and the defendant to recover a debt alleged to be due the bankrupt. *Babbit v. Burgess*, 7 N. B. R. 561; 2 Dill. 169; 5 Chi. Leg. News, 326; Fed. Cas. 693.

176. Where the property in controversy, at the time the debtor was adjudged bankrupt, was in the possession of a third person claiming title and dominion of the same, the question of ownership, if the same is claimed by the assignee, must be determined by a suit in equity or by an action at law, subject to re-examination as provided in the law of the forum where the suit is commenced. *Knight v. Cheney*, 5 N. B. R. 305; Fed. Cas. 7,883.

177. Section 14 of the act of 1867, which provides that the assignee may prosecute all suits pending in which the bankrupt is a party, does not compel him to do so, for under section 2 he may proceed in the United States courts. *Traders' Nat. Bank v. Campbell*, 6 N. B. R. 353; 14 Wall. 87.

177a. An instrument of assignment to an assignee, or copy thereof, is conclusive evi-

dence of his right to sue for any debt belonging to the bankrupt. Oral testimony to prove such assignment is inadmissible, unless evidence is first given to show that the original or a certified copy thereof cannot be produced. *Burke v. Winters, Ass.*, 15 N. B. R. 140.

178. Where an assignee in bankruptcy appears, and litigates in a suit pending in a state court at the time of the bankruptcy, he is bound by the judgment. *Westminster v. Heiskell*, 119 U. S. 450; *Ludeling v. Chaffe*, 143 id. 301.

179. The assignee in possession can maintain a suit in equity in the circuit court to remove the cloud on his title, and the court can enjoin a sale under the levy and a further levy. *Chapman v. Brewer*, 114 U. S. 158.

#### XV. TITLE NOT ACQUIRED BY TRUSTEE.

See *ESTATES*, 142, 161, 277.

180. If a claim in suit had been transferred by a bankrupt more than four months prior to proceedings in bankruptcy, and the suit, though in his name, is for the benefit of the transferee, the assignee in bankruptcy has no interest in the suit. If he consents that the bankrupt may continue to prosecute the suit in his own name, the bankruptcy is not a defense. *Thatcher v. Rockwell*, 105 U. S. 467.

181. An assignee of the estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property, and he cannot recover money paid to a creditor, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm. *Amsink et al. v. Bean, Ass.*, 11 N. B. R. 495; 23 Wall. 395.

182. No title to exempt property passes to an assignee by an assignment. It remains in the bankrupt and at his death it passes to his legal representatives. *In re Hester*, 5 N. B. R. 285; Fed. Cas. 6,487.

183. Suit was brought by an assignee to recover from an indorser, who received no proceeds therefrom, the amount of a note paid by the bankrupt as maker to the holder, before the maker became bankrupt. The in-

dorser was held not liable. *Bean, Ass., v. Laffin*, 5 N. B. R. 333; Fed. Cas. 1,172.

184. Where the district court at the petition of the assignee issued a rule to show cause against a stranger and the sheriff, who had seized the goods ten days prior to proceedings in bankruptcy to satisfy a lien for rent, and upon the return of the writ delivered the goods to the assignee and had them sold, *held*, the order was void, and the assignee acting under the order was a mere trespasser. *Marshall v. Knox*, 8 N. B. R. 97; 16 Wall. 551.

185. If a deed without any certificate of acknowledgment is good against a bankrupt, it is good against his assignee. *In re Kansas C. S. & M. Mfg. Co.*, 9 N. B. R. 76; Fed. Cas. 7,610.

186. An assignee must surrender to the owners any property found in the possession of the bankrupt but belonging to others. *In re Noakes*, 1 N. B. R. 164; Bank. Ct. Rep. 162.

187. A voluntary deed given by a bankrupt, without fraud, being good as between him and his grantees, cannot be questioned by his assignees in bankruptcy, but only by those who were creditors at the date of the conveyance. *Adams v. Collier*, 122 U. S. 382; *Warren v. Moody*, id. 132.

188. A bank has the right to set off the amount of a protested draft against the deposit of an insolvent debtor. Hence, when the amount of such draft exceeds the amount of the deposit, the assignee is not entitled to the deposit or any part of it. *In re Petrie et al.*, 7 N. B. R. 332; 5 Ben. 110; Fed. Cas. 11,040.

189. An assignee in bankruptcy has no interest in a claim assigned more than two months prior to bankruptcy proceedings and is not a necessary party to its submission to arbitration. *Crawford v. Halsey*, 124 U. S. 648.

190. Where the court (New York) first obtains possession of property and the control of litigation before being interfered with by the bankrupt court, liens by attachment or execution in the state court prior to the proceedings in bankruptcy take preference of claims of the assignee. *Appleton v. Bowles et al.*, 9 N. B. R. 354.

191. The right of a landlord on a distress warrant is paramount to that of an assignee in bankruptcy where the warrant was issued

prior to proceedings in bankruptcy. In re Weamer, 8 N. B. R. 527.

191a. A power of appointment vested in one who, until the execution of the power, has the title to the property does not pass to an assignee in bankruptcy of the person in whom the power resides. *Brandies v. Cochran*, 112 U. S. 844.

## XVI. TRUSTEE IN RELATION TO.

### (a) *Fraudulent Conveyances and Preferences.*

See FRAUD, 58; PREFERENCES, 2, 161; CLAIMS, 40, 44.

192. An assignee in bankruptcy may sue in the state as well as the United States court to recover property disposed of by the bankrupt in fraud of the act. *Gilbert v. Priest*, 8 N. B. R. 159.

193. An assignee may set aside any conveyance or fraudulent transfer that, but for the bankrupt act, might have been set aside by creditors after having obtained judgment. *Smith, Ass. etc., v. Ely*, 10 N. B. R. 553; Fed. Cas. 13,044.

194. An assignee in bankruptcy can bring a suit in a United States district court, other than that in which bankruptcy proceedings are pending, to recover money alleged to have been paid in violation of the act. *Shearman v. Bingham et al.*, 7 N. B. R. 490.

195. Where a creditor brought suit, after proceedings in bankruptcy were begun, to set aside a conveyance claimed to be void, held, that such suit should be brought by the assignee. *Thurmond v. Andrews et al.*, 13 N. B. R. 157.

196. While an assignee in bankruptcy may bring a suit in the district court of the United States to set aside a conveyance in fraud of the bankrupt's creditors, he is not precluded from bringing such suit in a state court. *McKenna v. Simpson*, 129 U. S. 506.

197. The assignee of a bankrupt may recover insurance moneys assigned by the assignee to his wife while in contemplation of insolvency and within six months before the filing of a petition in bankruptcy. *Vetterlein v. Barnes*, 124 U. S. 169.

198. Six elements are necessary to render a preference void: (1) insolvency; (2) intent

to prefer; (3) doing or suffering a thing which works a preference. These are on the part of a debtor. On the part of a creditor there are: (1) receiving or being benefited by such preference; (2) having reasonable cause to believe the debtor insolvent; (3) having reasonable cause to believe a preference to have been intended. These six make a transaction void if it be challenged by assignee. *Kohlsaat v. Hoguet*, 5 N. B. R. 159; 4 Ben. 565; Fed. Cas. 7,919.

199. In attacking a conveyance on the ground of fraud, an assignee represents the rights of general creditors, and may avoid the instrument, though he has no specific lien on the property. *Cragin v. Carmichael*, 11 N. B. R. 511; 2 Dill 519; Fed. Cas. 3,312.

200. A conveyance made more than six months before bankruptcy and in fraud of creditors was attacked by the assignee. Held, he could maintain the action. *Pratt v. Curtis*, 6 N. B. R. 189; 2 Lowell, 87; Fed. Cas. 11,875.

201. The assignee can avoid any conveyance which the creditors could avoid, although made more than six months before bankruptcy. Id.

202. An assignment made twelve months prior to filing a petition is good against the assignee of the bankrupt. The assignee takes only the rights of the bankrupt, except in cases of fraud. In re Arledge, 1 N. B. R. 195; Fed. Cas. 533.

203. If A. conveyed property to B, when in failing circumstances, for the purpose of defrauding creditors, and B. has knowledge of the fact, if A. is adjudged bankrupt, the sale of goods to B. is void, and title vests in the assignee. *Bolander v. Gentry*, 2 N. B. R. (8 vo. ed.) 656.

204. Fraudulent payments may be recovered by a bankrupt's assignee. *Morgan et al. v. Mastick*, 2 N. B. R. 163; Fed. Cas. 2,903.

205. A firm, having no property but their stock in trade, are insolvent, if, when pressed for debt, they give as a reason that they are unable to pay, and suffer judgment to be rendered against them. If such judgment be given within four months prior to application in bankruptcy, property taken thereunder will be restored to the assignee. *Wilson, Ass., v. City Bank*, 5 N. B. R. 270.

206. Where any person being insolvent

procures or suffers his property to be taken on legal process with intent to give preference to creditors, or to delay or defeat the operation of the act, the assignee may recover the property so taken, if the person taking it had reasonable cause to believe a fraud on the act was intended and that the debtor was insolvent. *In re Lord*, 5 N. B. R. 318; Fed. Cas. 8,503.

207. Where a creditor seizes a bankrupt's property by execution and sells the same, the assignee may recover the value, less the cost of selling, but not including sheriff's fees. *Sedgwick, Ass., v. Millward*, 5 N. B. R. 347; Fed. Cas. 12,618.

208. Where a preference is obtained through a levy of execution, an assignee may proceed, in equity, to set aside the lien, and may make the sheriff, as well as the creditor, a party, if the proceeds of the execution be still in the hands of the sheriff. *Warren v. Tenth Nat. Bank et al.*, 7 N. B. R. 481; 10 Blatchf. 498; Fed. Cas. 17,202.

209. An assignee was entitled to judgment against a creditor for the value of property seized on execution within four months before the filing of the petition of the bankrupt, who suffered his property to be taken. *Christman v. Haynes*, 8 N. B. R. 528; Fed. Cas. 2,708.

### (b) *General Assignments.*

See ASSIGNMENT, 26.

210. The title of an assignee in bankruptcy who was, before, assignee under an assignment, relates back to the execution of the deed; and all his acts after he received the property and assets, not inconsistent with his duty as assignee in bankruptcy, will be approved by the court. *In re Walker*, 18 N. B. R. 56; Fed. Cas. 17,063.

211. It is the duty of the assignee in bankruptcy to recover from general assignees any assets which the creditors could have recovered. *Aiken v. Edrington, Sr., et al.*, 15 N. B. R. 271; Fed. Cas. 111.

212. Except as against an assignee in bankruptcy, an assignment for the benefit of creditors is not void, although it gives priority to certain creditors. *Shryock et al., Ass., v. Bashore*, 13 N. B. R. 481; Fed. Cas. 12,820.

213. When an assignee under the laws of Iowa took the bankrupt's property and sold it, acting in good faith, he is not to be held personally liable to the assignee under the bankrupt act for the value of the property. *Cragin, Ass., v. Thompson*, 12 N. B. R. 81; 2 Dill 518; Fed. Cas. 3,320.

214. A trustee under a private assignment had received an amount which he deposited in his own name. Finding himself insolvent, he withdrew the money and deposited it as trustee. Two months afterward he was adjudged bankrupt. The assignee petitioned to have the money declared to be assets for the general creditors. The motion was denied, a prescribed mode of settlement being ordered. *Ex parte Hobbs, In re Hapgood*, 14 N. B. R. 495; 2 Lowell, 491; Fed. Cas. 6,549.

215. If a trustee deposit the trust funds in a bank in his own name, after his bankruptcy the mode of ascertaining how much belongs to the trust estate is to take the deposits and withdrawals in the order of their dates and find out how much of the balance belongs to the trust and how much to the general fund, and divide accordingly. *Id.*

216. Where one made an assignment for the benefit of all his creditors alike, and proceedings were had against the assignee, as the garnishee, on a judgment against the assignor, *held*, that such an assignment did not come within the state insolvent laws, and was not rendered void by the bankrupt law. *Cook et al. v. Rogers, etc.*, 13 N. B. R. 97.

### (c) *Mortgages.*

See MORTGAGES, 55, 70, 72, 83, 107.

217. An assignee succeeded to the rights the bankrupt had in property, and a suit may be maintained to correct a description in a mortgage given by the bankrupt. *Schulze, Ass. etc., v. Bolting*, 17 N. B. R. 167; 8 Biss 174; Fed. Cas. 12,489.

218. An assignee in bankruptcy brought suit to avoid a mortgage void under state laws as in fraud of creditors. *Held*, that the assignee could maintain such action though the mortgage might not be voidable under the bankrupt law. *Wait, Ass. etc., v. The Bull's Head Bank*, 19 N. B. R. 500; Fed. Cas. 17,043.

219. The assignee in bankruptcy of a mortgagor stands in the position of a judgment creditor, the adjudication being equivalent to the recovery of judgment and a levy. *Miller, Ass., v. Jones*, 15 N. B. R. 150; Fed. Cas. 9,576.

220. An assignee stands in the place of an execution creditor and may impeach the validity of a secret mortgage of his assignor. His right is stronger than the right of the bankrupt. *In re Gurney*, 15 N. B. R. 373; 7 Biss. 414; 9 Chi. Leg. News, 255; 4 Law & Eq. Rep. 28; Fed. Cas. 5,878.

221. An assignee in bankruptcy represents the whole body of creditors, and it is his duty to contest the validity of a mortgage by which one creditor has obtained a preference. *In re Matzger*, 2 N. B. R. 114; 1 Chi. Leg. News, 163; 2 Amer. Law T. Rep. Bankr. 53; Fed. Cas. 9,510.

222. A. executed a mortgage to B, and subsequently a second to C, shortly after which C. was adjudged bankrupt, and an assignee was appointed who took steps to foreclose C.'s mortgage, and had an order of sale passed. During proceedings on the mortgage to C., B. instituted proceedings to foreclose the first mortgage, making C.'s assignee defendant; a subpoena was served on him, and the bill was taken as confessed for want of appearance, five days after which C.'s assignee died. The premises were sold under a decree in favor of B. Upon a bill filed by a second assignee of C. to redeem, *held*, that the right of redemption was not affected by the sale. *Avery, Ass. etc., v. Ryerson et al.*, 16 N. B. R. 289.

223. A chattel mortgage, void as against creditors under a state law and under which the mortgagee had taken possession, having reasonable cause to believe the debtor insolvent, is void as against the assignee in bankruptcy. *Harvey, Ass., v. Crane*, 5 N. B. R. 218; 2 Biss. 496; 3 Chi. Leg. News, 341; Fed. Cas. 6,178.

224. J. D., subsequently a bankrupt, gave a chattel mortgage with a schedule attached which was left with the proper officer, but he failed to record the schedule. In that state an unrecorded mortgage is valid as between the parties. The question was whether the assignee could take a good title as against the claimant under the unrecorded mortgage.

*Held*, that the assignee was affected by the equities as the bankrupt himself. *In re Low*, 6 N. B. R. 10; Fed. Cas. 4,036.

#### (d) *Stockholders.*

See STOCKHOLDER, 8, 16a.

225. Where the assignees in bankruptcy of a holder of stock of a company never accepted the same nor consented to become stockholders, neither they nor the assets of the bankrupt nor their goods are subject to the individual liability of stockholders for the debts of the corporation. *American File Co. v. Garrett*, 110 U. S. 228.

226. The assignee has the authority of a receiver to collect demands and pay debts, and under the order of the court an assessment may be made on the unpaid shares, just as if the same had been ordered by the corporation before bankruptcy. *Myers, Ass., v. Seeley et al.*, 10 N. B. R. 411; 1 Cent. Law J. 451; Fed. Cas. 9,994.

227. The assignee in bankruptcy has the authority of a receiver to collect demands, and by order of court he may make an assessment on unpaid shares just as the corporation could have done. *Id.*

#### (e) *Committee of Creditors.*

See CLAIMS, 27.

228. Proceedings in bankruptcy were superseded by an arrangement whereby the estate was to be wound up by a trustee under the control of a committee, when an effort was made to hold a second meeting of creditors. *Held*, that in the absence of fraud the committee could exercise their discretion undisturbed. *In re Jay Cooke & Co.*, 11 N. B. R. 1; 10 Phila. 262; 31 Leg. Int. 357; 1 Wkly. Notes Cas. 51; 9 West. Jur. 157; 23 Pittsb. Leg. J. 59; 1 Cent. Law J. 590; Fed. Cas. 3,169.

229. Under section 43 of the bankrupt act of 1867, the purport of which is to substitute trustees, under the direction of a committee of creditors, for the machinery provided by the act, the trustees may proceed to settle the estate as if there had been no adjudication of bankruptcy and the bankrupt was managing his own affairs, taking care to secure legal protection to the creditors. *In re*

Darby, 4 N. B. R. 61, 98; 18 Pittsb. Leg. J. 154; Fed. Cas. 8,570.

230. A resolution of creditors of a bankrupt committing his estate for settlement and distribution to a trustee, and nominating a committee composed of two members, one of whom is the trustee, to supervise and direct the trustee, will not be confirmed. In re Stillwell, 2 N. B. R. 164; Fed. Cas. 13,447.

### (f) *Usury.*

231. An assignee in bankruptcy of one of two joint makers of a note secured by a mortgage cannot maintain a petition to declare the security void for usury. Bromley, Ass. v. Smith et al., 5 N. B. R. 152; 2 Biss. 511; 8 Chi. Leg. News, 297; Fed. Cas. 1,922.

232. An assignee in bankruptcy may sue for money paid as usury by the bankrupt. Wheelock v. Lee, 10 N. B. R. 368.

233. The assignee can take advantage of usury, and the defense is good so long as any part of the principal debt remains unpaid; and he may apply the usurious interest towards the principal. In re Prescott, 9 N. B. R. 385; 5 Biss. 523; 6 Chi. Leg. News, 151; Fed. Cas. 11,889.

### (g) *Waiver of Property.*

234. Assignees in bankruptcy are not bound to accept property of an onerous or unprofitable nature. American File Co. v. Garrett, 110 U. S. 288.

235. Assignees are not bound to accept property assigned by the bankrupt if of an unprofitable and onerous nature which would burden instead of benefit the estate. Sparhawk v. Yerkes, 142 U. S. 1.

236. The title to a patent passes to the assignee in bankruptcy of the patentee subject to the assignee's election not to accept it if in his opinion it is worthless, or would prove burdensome and unprofitable, and he is entitled to reasonable time to make such election. Sessions v. Romadka, 145 U. S. 29.

## UNITED STATES.

### I. UNAFFECTED BY BANKRUPTCY ACT. II. HAS PRIORITY.

### III. MAY SUE IN EQUITY.

### IV. WAIVER.

### V. IN GENERAL.

See ESTATES, 212, 218, 215-219; SALES, 56; STATE LAWS, 12; LIMITATIONS, STATUTE OF, 47.

### I. UNAFFECTED BY BANKRUPTCY ACT.

See COURTS, 128; DISCHARGE, 287, 265.

1. Debts due to the United States are not within the provisions of the bankrupt act. United States v. Herron, 9 N. B. R. 535; 20 Wall. 251.

2. The United States is entitled to priority of payment without regard to the form of the indebtedness. It is in no wise bound by the bankrupt act, and is entitled to priority although it does not prove its claim. It need not exhaust the collaterals held by it before claiming priority of payment out of a bankrupt's estate. Lewis, Tr., v. United States, 14 N. B. R. 64; 92 U. S. 618.

### II. HAS PRIORITY.

See CLAIMS, VIII, (g).

3. The United States is not obliged to first exhaust its securities for a claim before enforcing its right to priority. United States v. Lewis et al., 13 N. B. R. 33; 2 Wkly. Notes Cas. 31; 22 Int. Rev. Rec. 39; 32 Leg. Int. 871; 23 Pittsb. Leg. J. 34; Fed. Cas. 15,595.

4. Although the claim of the United States is against a firm, it is entitled to priority of payment out of the individual estates of the partners. Id.

5. If the United States holds a claim against a firm of which some of the partners are aliens, it may claim priority of payment out of the estate of the resident individual partners, without first resorting to the partnership effects. Lewis, Tr., v. United States, 14 N. B. R. 64; 92 U. S. 618.

### III. MAY SUE IN EQUITY.

6. The United States may file a bill in the circuit court to obtain payment out of a trust fund held by a trustee appointed in proceedings in bankruptcy. Id.

## IV. WAIVER.

7. A. was surety on a bond given to the United States in a suit to forfeit a steamer and cargo. Before the termination of the suit in favor of the United States, A. became bankrupt and was discharged. The United States sued him and obtained judgment on the bond, which judgment was transferred to B. for a consideration. B. then filed a petition to set aside the discharge. The petition was dismissed. *In re Mansfield*, 6 N. B. R. 388; Fed. Cas. 9,049.

## V. IN GENERAL.

8. Property of the United States is subject to contribution for salvage. *Douglass v. Davis*, 2 N. B. R. 3.

## USURY.

- I. WHAT IS NOT.
- II. WHO MAY PLEAD.
- III. WHO MAY SUE FOR.
- IV. EFFECT OF.
- V. RECOVERY.
- VI. RES ADJUDICATA.
- VII. BANK.
- VIII. IN GENERAL.

See EVIDENCE, 122; JUDGMENT, 54; PLEADING AND PRACTICE, 9; SALES, 95; TRUSTEES, 281-233.

## I. WHAT IS NOT.

1. A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void, and does not make such judgment usurious. *In re Fuller*, 4 N. B. R. 29; 1 Sawy. 243; 18 Pittsb. Leg. J. 82; 2 Chi. Leg. News, 373; Fed. Cas. 5,148.

## II. WHO MAY PLEAD.

2. The defense of usury can be pleaded by the assignee in bankruptcy so long as any part of the debt for which the usury was paid, or agreed to be paid, remains unpaid. *In re Prescott*, 9 N. B. R. 385; 5 Biss. 523; 6 Chi. Leg. News, 151; Fed. Cas. 11,389.

## III. WHO MAY SUE FOR.

See CLAIMS, 271.

3. An assignee in bankruptcy may sue for money paid as usury by the bankrupt, and the right to recover may be enforced by the assignee of the paper against the representative of the lender upon the principle that the payment in violation of law gave no title to the lender. *Wheelock v. Lee*, 10 N. B. R. 363.

## IV. EFFECT OF.

See CLAIMS, 270, 272, 273; COURTS, 83, 255.

4. An assignee in bankruptcy of one of two joint makers of a note secured by a mortgage cannot maintain a petition to declare the security void for usury. *Bromley, Ass., v. Smith et al.*, 5 N. B. R. 152; 2 Biss. 511; 8 Chi. Leg. News, 297; Fed. Cas. 1,922.

5. A loan was made with interest at thirty per cent. per annum, the principal and interest at twelve per cent. being secured by a note and mortgage, and the balance of the interest (eighteen per cent.) being represented by a separate note payable in monthly instalments without security. Before the term expired the maker of the note was adjudged a bankrupt. *Held*, that there should be a rebate upon the note of the interest at eighteen per cent. on the loan for the period it had yet to run. *In re Riggs, Lechtenberg & Co.*, 8 N. B. R. 90.

6. On exceptions by the assignee in bankruptcy against the decision of a register allowing the claim of a creditor for principal and usurious interest, *held*, that the creditor forfeited all of the usurious interest and the assignee might apply the same towards the extinguishment of the principal debt. *In re Prescott*, 9 N. B. R. 385; 5 Biss. 523; 6 Chi. Leg. News, 151; Fed. Cas. 11,389.

7. A bankrupt made an accommodation note for A., for whom a broker sold the note to a Connecticut bank, which paid for it at ten per cent. discount by check on a New York bank, the note being payable in New York. *Held*, the law of New York governed, and the note was void for usury. *In re Dodge et al.*, 17 N. B. R. 504; 9 Ben. 480; Fed. Cas. 3,943.

8. An order authorizing the assignee to surrender to a creditor certain securities on the release of the debt secured thereby was



granted *ex parte* on application by the assignee, and an affidavit setting forth that the debt was due and amounted to more than the value of the securities. On motion to vacate, it appeared that the bankrupt had paid more usury than principal. *Held*, that the order should be vacated and the usurious payments applied upon the principal. *In re Hoole*, 19 N. B. R. 477; Fed. Cas. 6,673.

### V. RECOVERY.

9. Where the charter of a bank prohibited more than a specified rate of interest, it was held that an illegal rate would not render the whole note void, but only the excess beyond the legal rate, and that if such a note be voluntarily paid, neither the borrower nor his assignee in bankruptcy can recover more than the excess beyond the legal rate of interest, and equity will entertain a bill to recover such excess. *Darby v. Boatman's Sav. Inst.*, 4 N. B. R. 195; 1 Dill. 141; 3 Chi. Leg. News, 249; 4 Amer. Law T. 117; 1 Leg. Op. 146; Fed. Cas. 3,571.

10. A bill in equity was brought by a bankrupt's representative against a bank that had charged higher interest than allowed by its charter to recover the principal and usurious interest from the bank. *Held*, that only the excess over the legal interest could be recovered. *Tiffany v. Boatman's Sav. Inst.*, 9 N. B. R. 245; 18 Wall. 375.

11. The collaterals given by the bankrupt for a usurious loan cannot be recovered by the assignee unless he tender the amount actually loaned to the bankrupt. *Wheelock, Ass. etc., v. Lee*, 17 N. B. R. 563.

### VI. RES ADJUDICATA.

12. When judgment has been rendered in favor of the plaintiff on a plea of usury, the assignee in bankruptcy of the defendant cannot open that question. *McKinsey et al. v. Harding*, 4 N. B. R. 10; Fed. Cas. 8,866.

### VII. BANK.

See BANK, 44; COMMERCIAL PAPER, 30.

13. A state law prohibiting corporations from pleading usury constitutes such state a state in which no rate of interest is fixed

by law as against corporation borrowers, within the meaning of the federal banking and currency act, and a national bank doing business in such state can only charge corporation borrowers seven per cent., and the defense of usury, with all its pains and penalties, applies. *Ocean Nat. Bank v. Wild*, 10 N. B. R. 568; Fed. Cas. 3,571.

### VIII. IN GENERAL.

14. The reservation of a greater rate of interest than six per centum by a national bank, on discounting a promissory note, does not render the debt for the principal thereof one not provable in bankruptcy. *In re Moore*, 1 N. B. R. 128; 2 Bond, 170; Fed. Cas. 10,041.

15. A petition having been filed against a debtor alleging that he had committed acts of bankruptcy by suspending payment of his commercial paper, the defendant answered denying his insolvency and alleging a defense (*i. e.*, that the note was usurious). *Held*, that the answer presented an issue of fact upon the suspension of payment; and further, that it was not the intention of the bankrupt act to force a debtor to pay his commercial paper under penalty of being adjudged a bankrupt, regardless of any defense he might have against the same. *In re Staplin*, 9 N. B. R. 143; 5 Chi. Leg. News, 628; 5 Leg. Op. 171; Fed. Cas. 13,304.

16. The holder of a note having taken more than lawful interest, the indorser is not liable for more than the holder actually paid with legal interest. *In re Many et al.*, 17 N. B. R. 514; Fed. Cas. 9,054.

### VERIFICATION.

#### I. WHEN NECESSARY.

#### II. WHEN NOT NECESSARY.

#### III. SUFFICIENCY OF.

#### IV. BEFORE WHOM MADE.

#### V. IN GENERAL.

See AGENT; ATTORNEY; PETITION, VIII; PLEADING AND PRACTICE, 125; PROOF OF DEBT.

#### I. WHEN NECESSARY.

1. In courts where answers are verified in common-law actions, the answer to an involuntary petition in bankruptcy must also

be verified. In re Findlay, 9 N. B. R. 88; 5 Biss. 480; 6 Chi. Leg. News, 94; Fed. Cas. 4,789.

2. Where several petitioners join in a petition in separate and distinct rights, a verification by or on behalf of each petitioner is required; but when a petition is filed jurisdiction is acquired, and the court may allow an amendment of the verification. In re Simmons, 10 N. B. R. 254; 1 Cent. Law J. 440; Fed. Cas. 12,864.

3. The general intent of the amended bankrupt act, approved June 22, 1874, would seem to indicate that the list of creditors presented by the debtor, in denial that the requisite number and amount have joined in the petition, should be sworn to by him. In re Steinman, 10 N. B. R. 214; 6 Biss. 166; 6 Chi. Leg. News, 338; 21 Pittsb. Leg. J. 200; Fed. Cas. 13,357; In re Hymes, 10 N. B. R. 433; 7 Ben. 427; Fed. Cas. 6,986.

4. The provisions of the statute as to verification of the petition must be strictly followed. It is a matter of substance and right, and is not to be dispensed with under cover of an apparent compliance with the act. In re Keiler et al., 18 N. B. R. 10; 7 Chi. Leg. News, 42; 9 West. Jur. 175; Fed. Cas. 7,647.

## II. WHEN NOT NECESSARY.

5. The application of an assignee for the examination of the bankrupt under the twenty-sixth section of the bankrupt act of 1867 need not be verified. In re Lanier, 2 N. B. R. 59; Fed. Cas. 8,070.

6. The register, in the exercise of his discretion (section 26, act of 1867), thought proper to grant the order for the bankrupt's examination without requiring a petition, or an affidavit, duly verified, showing good cause for the same. *Held*, it not appearing that his discretion was improperly exercised, the order must stand. In re Solis, 4 N. B. R. 18; 4 Ben. 143; Fed. Cas. 13,165.

7. A denial of the alleged acts of bankruptcy need not be sworn to. In re Hawkeye Smelting Co., 8 N. B. R. 385.

## III. SUFFICIENCY.

8. The affidavit of an agent or attorney is sufficient to accompany an application for an injunction pending an adjudication in bankruptcy. In re Fendley, 10 N. B. R. 250; Fed. Cas. 4,728.

## IV. BEFORE WHOM MADE.

9. The verification of a schedule and inventory by a bankrupt is an affidavit and may be sworn to before a notary public. In re Bailey, 15 N. B. R. 48; Fed. Cas. 737.

## V. IN GENERAL.

10. If it appears that the petitioning creditor in fact authorized the institution of the proceedings in his behalf and so became liable for costs, the matter of signing and authentication is purely formal and unimportant to any right of the debtor. In re Raynor, 7 N. B. R. 527; 11 Blatchf. 43; Fed. Cas. 11,597.

11. The petition was defective, inasmuch as the form prescribed by the supreme court required the affidavit and petition to be subscribed by the petitioners. The defect was held to be incurable, since the petition was not a petition *in propria forma*, such as could be amended. In re Moore et al. v. Hadley, 4 N. B. R. 71; 2 Balt. Law Trans. 666; Fed. Cas. 9,764.

## VOTE.

### I. FOR TRUSTEE (ASSIGNEE).

- (a) *What Creditors May.*
- (b) *What Creditors May Not.*
- (c) *Change of Vote.*
- (d) *Failure to Elect.*

### II. FOR COMPOSITION.

- (a) *Holders of Proved Claims.*
- (b) *Objection to.*
- (c) *By One Without Interest.*

### III. FOR DISCHARGE.

### IV. ON DEBTS SOLD AFTER PROOF.

### V. EFFECT OF.

See PARTNERS, 157; TRUSTEES, 159.

### I. FOR TRUSTEE (ASSIGNEE).

- (a) *What Creditors May.*

1. The question was certified by the register as to the correctness of the contention of certain creditors of the bankrupt, who held pledges of personalty, to their right to be admitted to a meeting of creditors to prove their debts and choose an assignee. The court held such right to exist. In re Bolton, 1 N. B. R. 83; 2 Ben. 189; 1 Amer. Law T. Rep. Bankr. 120; Fed. Cas. 1,614.

2. A creditor's proof of debt showed that his debt was secured by a mortgage on the bankrupt's homestead. Upon the objection of the other creditors, *held*, that he was entitled to vote upon his whole claim for the choice of an assignee. In *re Stillwell*, 7 N. B. R. 226; 11 Amer. Law Reg. (N. S.) 706; Fed. Cas. 18,448.

3. A secured creditor may vote for assignee on so much of his debt as is unsecured when the security applies only to a specific portion of his debt. In *re Parkes et al.*, 10 N. B. R. 82; Fed. Cas. 10,754.

### (b) *What Creditors May Not.*

4. Creditors who have proved a debt against a partner of a firm in bankruptcy have no right to participate in the election of the assignee for the firm, who must be chosen by the creditors of the firm only. In *re Phelps*, 1 N. B. R. 139; 2 Amer. Law T. Rep. Bankr. 25; Fed. Cas. 11,071.

5. The postponement of a proof of claim by a register in bankruptcy affects no right of the creditor except the right to vote for assignee. In *re Lake Superior S. C., R. R. & I. Co.*, 7 N. B. R. 376; Fed. Cas. 7,997.

6. Proofs of claim filed after election for an assignee in bankruptcy will not entitle the claimant to vote thereon to change the result of an election appealed from, *Id.*

### (c) *Change of Vote.*

7. A creditor cannot change his vote on the ground of his own mistake in voting after the meeting of creditors has adjourned and thereby give the register power to appoint the assignee, but such creditor may explain his mistake, or make any other objection to the choice of the assignee to the court before which the subject of the approval of the assignee will be heard and determined. In *re Scheiffer et al.*, 2 N. B. R. 179; 1 Chi. Leg. News, 261; Fed. Cas. 12,445.

8. A creditor may change his vote at pleasure until he signs the certificate of choice of assignee; but if he votes corruptly, as for a consideration paid by the bankrupt, his vote will be thrown out, though, unless excluding such vote would change the result, the election will not be sent back. In *re Pfromm*, 8 N. B. R. 357; Fed. Cas. 11,061.

### (d) *Failure to Elect.*

9. An informal vote is unknown to the law, and when no choice results from the vote of creditors at the first meeting, it is the duty of the register to inform the creditors that the choice devolves on the judge. In *re Pearson*, 2 N. B. R. 151; Fed. Cas. 10,878.

## II. FOR COMPOSITION.

### (a) *Holders of Proved Claims.*

10. A creditor who has bought a debt with intent to prevent the adoption of a pending resolution for composition on the debtor's part may vote upon it at the meeting for composition, if he have no fraudulent or oppressive motive. In *re Morris*, 12 N. B. R. 170.

11. Before they are permitted to vote on a resolution of composition creditors must prove their claims, but in involuntary proceedings the petitioning creditors are not bound to prove anew at a meeting for composition. In *re Scott, Collins & Co.*, 15 N. B. R. 73; 4 Cent. Law J. 29; Fed. Cas. 12,519.

12. If a creditor fails to act on a composition, his non-action is equivalent to a positive vote against what the debtor wants. In *re Lissberger*, 18 N. B. R. 230; Fed. Cas. 8,884.

13. At the first session of the first meeting a creditor presented himself and filed proof of claim. He was not present at the last session when the vote was taken on a resolution of composition. *Held*, that he was to be counted as voting against the resolution, unless he clearly indicated to the register his intention to withdraw. In *re Richmond et al.*, 18 N. B. R. 362; Fed. Cas. 11,798.

### (b) *Objection to.*

14. After a composition was accepted at the creditors' meeting, objection was taken to the vote of one of the creditors. *Held*, that the objection was too late, as it should have been made at the first meeting before the vote was taken. In *re Block et al.*, 18 N. B. R. 328; Fed. Cas. 1,551.

### (c) *By One Without Intent.*

15. One of those voting in the affirmative on a composition was the assignee of an insolvent firm. Without his vote there were

not sufficient favoring the resolution to confirm it. The bankrupt had lent his accommodation notes to the firm to an amount greater than their claim, and they had dis-counted them for their own use. The hold-ers of the notes proved them against the es-tate. *Held*, that the composition was not approved by the required number, as the as-signee had no interest in the composition. In re Purcell, 18 N. B. R. 447; Fed. Cas. 11,470.

### III. FOR DISCHARGE.

16. A creditor whose debt was contracted prior to January 1, 1869, should not be al-lowed to vote on the question of a bankrupt's discharge as to debts contracted since Janu-ary 1, 1869. In re Parrish, 9 N. B. R. 578; Fed. Cas. 10,769.

### IV. ON DEBTS SOLD AFTER PROOF.

17. Debts proved before the election of an assignee and sold and assigned after proof must be voted upon by the owner and not the original creditor, the owner being en-titled to one vote. In re Frank, 5 N. B. R. 194; 5 Ben. 164; Fed. Cas. 5,050.

### V. EFFECT OF.

18. The vote cannot affect the private rights of stockholders in their dealings with the corporation if they were not present and did not assent and had no notice of the vote until it was too late to affect action under it, though the meeting was a legal meeting. In re Massachusetts Brick Co., 5 N. B. R. 408; 2 Lowell, 58; 4 Amer. Law T. 220; Fed. Cas. 9,259.

19. It is not the intention of section 43 of the act of 1867 that the will of three-fourths of the creditors is to control the others, unless it appear to the court that the interests of the latter will be promoted by carrying the resolution into effect. In re Vetterlein, 6 N. B. R. 518; 5 Ben. 571; Fed. Cas. 16,928.

### WAGES.

#### See OPERATIVES.

1. Servants' wages paid after the passage of the bankrupt act as necessary family ex-

penses cannot be allowed on objection to dis-charge. In re Rosenfeld, 2 N. B. R. 49; 1 Amer. Law T. Rep. Bankr. 100; Fed. Cas. 12,057.

2. When workmen employed by the bank-rupt within six months before bankruptcy were not paid, and borrowed the money to take them home, giving him an assignment of their claim, a claim for such borrowed money should be allowed out of the \$50 al-lowed each workman as a prior lien (act of 1867). In re Brown, 3 N. B. R. 177; 4 Ben. 143; Fed. Cas. 1,974.

3. The father of a minor is entitled to a preferred claim not exceeding \$50 for such minor's labor within six months of the bank-ruptcy (act of 1867). In re Harthorn, 4 N. B. R. 27; Fed. Cas. 3,162.

4. The statute of limitation contained in section 2 of the bankrupt act of 1867 does not apply to a case brought by an assignee to recover money alleged to be due on an agree-ment to pay the bankrupts, as salaries, a per centum of the net profits of the defendant's business. Sedgwick, Ass. v. Casey, 4 N. B. R. 161; 4 Ben. 562; 3 Chi. Leg. News, 177; Fed. Cas. 12,610.

5. The payment of wages to employees, though made in the regular course of busi-ness, is an act of bankruptcy if done in con-templation of insolvency, for the preference to the amount of \$50 must be procured by and through the bankruptcy proceedings (act of 1867). In re Kenyon & Fenton, 6 N. B. R. 238.

6. When bankrupt made an agreement with a party to pay him for certain services the benefits of which would accrue to the other creditors, such claim is entitled to pref-erence. In re Nounnan & Co., 6 N. B. R. 572.

### WAIVER.

#### I. BY CREDITOR.

- (a) *Generally.*
- (b) *Of Securities.*

#### II. BY DEBTOR.

- (a) *Generally.*
- (b) *Of Discharge.*

#### III. OF NOTICE.

See EXEMPTIONS, 68, 71; JURY TRIALS, 4; PETITIONS, 28; SALES, 102; TRUSTEES, XVI, (g).

## I. BY CREDITOR.

### (a) *Generally.*

1. On exceptions to resolutions for composition, *held*, that it is a right of even a small minority of creditors present at a composition meeting to insist upon an examination of the bankrupt before a vote is taken, but such right is waived by moving for a vote before such examination has been had. In *re Little*, 19 N. B. R. 234; 2 N. J. Law J. 211; Fed. Cas. 8,392.

2. A witness objected to being examined before the register because there was no question in controversy, but submitted to the examination. On certification it was held that under the twenty-sixth section of the act of 1867 the witness could be examined. In *re Fredenberg*, 1 N. B. R. 34; 2 Ben. 133; Fed. Cas. 5,075.

3. A receipt of payment by petitioning creditors to an amount sufficient to reduce the indebtedness below the minimum established by the act is a waiver of the act of bankruptcy. In *re Skelly*, 5 N. B. R. 214; 3 Biss. 260; Fed. Cas. 12,921.

4. A and B, creditors, each filed a petition in bankruptcy against C. While these proceedings were pending C. himself filed a petition and was adjudged a bankrupt. A and B. proved their claims under the voluntary petition. *Held*, that they thereby waived their right to continue the involuntary proceedings. In *re Nounnan & Co.*, 6 N. B. R. 579.

5. Where a sale is made conditioned upon the goods being delivered and set up for use, a direction to the servant of the purchaser to finish placing the machinery, and that he, the agent, would pay the purchaser for such work, is not a waiver so that title will pass to the purchaser if he becomes bankrupt before the work is done. In *re Pusey*, 6 N. B. R. 40; Fed. Cas. 11,477.

6. Where a debtor makes an assignment under a state law, and the creditor applies to the state court to have the security of the assignee increased, this is not such an assent to the proceedings as will estop him from claiming the assignment was an act of bankruptcy. In *re Langley*, 1 N. B. R. 155.

### (b) *Of Security.*

7. Secured creditors may file a petition in involuntary bankruptcy and such act is a waiver of the security. In *re Broich et al.*, 15 N. B. R. 11; 7 Biss. 308; Fed. Cas. 1,921.

8. A creditor who has a judgment upon the property of the debtor, filing a petition in bankruptcy without reference to such lien, thereby waives his lien. In *re Bloss*, 4 N. B. R. 87; Fed. Cas. 1,562.

9. A register claimed that the creditors waived their lien on cotton by taking one on land. The court held that the lien had not been waived. In *re Hutto*, 8 N. B. R. 191; Fed. Cas. 6,960.

10. A party who has a lien for pasturing stock waives it by giving up possession of the property and allowing it to be sold without claiming his lien. In *re Mitchell*, 8 N. B. R. 47; 5 Chi. Leg. News, 271; Fed. Cas. 9,657.

11. Subsequent to the filing of a petition a secured creditor may waive his security, thus securing the rights of an unsecured creditor. In *re Crossette et al.*, 17 N. B. R. 208; Fed. Cas. 3,435.

12. Where the plaintiff elected to sue the assignee for damages, he waived any claim he had to moneys in the assignee's hands, and is not entitled to priority over expenses preferred by statute. In *re Oberhoffer*, 17 N. B. R. 546; 9 Ben. 485; Fed. Cas. 10,396.

## II. BY DEBTOR.

### (a) *Generally.*

#### See ATTORNEYS, 4.

13. A defect in the verification of the creditors' petition is waived by the debtor, in the absence of fraud, when he calls a meeting in composition. In *re Morris*, 11 N. B. R. 443; 2 Lowell, 898; 12 N. B. R. 170; Fed. Cas. 7,303.

14. Partnership property should go toward partnership debts, but partners may waive this benefit by giving a mortgage upon partnership property for the individual debts. In *re Kahley*, 4 N. B. R. 124; 2 Biss. 383; 3 Chi. Leg. News, 85; Fed. Cas. 7,598.

15. A bankrupt claimed that the verification and signature of the cashier of a bank were not valid. *Held*, that he waived the

objection by joining issue upon the petition. In re McNaughton, 8 N. B. R. 44; Fed. Cas. 8,912.

16. A claimant must show that he has furnished proof of loss, or that there has been a waiver of it by the company; but the assignee has no power to waive it. In re Fireman's Ins. Co., 8 N. B. R. 123; 3 Biss. 462; 5 Chi. Leg. News, 265; Fed. Cas. 4,796.

17. A provision in the by-laws of a corporation, requiring a transfer to be made upon the books of the company, may be waived by the company. Upton, Ass. v. Burnham, 8 N. B. R. 221; 3 Biss. 431; Fed. Cas. 16,798.

18. By answering to a petition a corporation admits that it may be proceeded against in bankruptcy, and afterwards it cannot object that it is not alleged that it is a commercial corporation. In re Oregon Bull. P. and P. Co., 13 N. B. R. 503; 1 Cin. Law Bul. 87; Fed. Cas. 10,559.

19. Objection to the jurisdiction over the person may be expressly waived, and the same thing may be done by implication through any act indicating it to be the design of the person entitled to make it, not to insist upon it. People ex rel. Jennys v. Brennan, 12 N. B. R. 567.

20. Where the set-off is founded in a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper. McCabe, Ass. etc., v. Winship, 17 N. B. R. 113; Fed. Cas. 8,668.

21. The want of jurisdiction appeared on the petition, but the respondents consented to the jurisdiction. Held, that the court should take notice of the point of its own motion. Hopkins v. Carpenter et al., 18 N. B. R. 339; Fed. Cas. 6,686.

### (b) Of Discharge.

22. A decree of discharge in bankruptcy should be treated as a discharge of the debt *sub modo* only, and any new promise is a waiver of the bar to the recovery created by the discharge. Dusenbury v. Hoyet, 10 N. B. R. 313.

22a. A debt created by fraud, on which judgment has been recovered, is not a debt that is affected by a discharge in bankruptcy. In re Patterson, 1 N. B. R. 58; 2 Ben. 155; 15 Pittsb. Leg. J. 241; Fed. Cas. 10,817.

23. A bankrupt who permits a judgment

to be recovered against him, by neglecting to insist upon his discharge waives such discharge and renders any property he may have liable for the judgment. Dewey et al. v. Moyer et al., 16 N. B. R. 1.

### III. OF NOTICE.

24. Where the composition agreement provides that proceedings may be discontinued without notice to the creditors, such provision is only a waiver by creditors of notice of an application to discontinue, and the court is not bound to grant the application. In re McNab & Harlin Mfg. Co., 18 N. B. R. 388; 21 Pittsb. Leg. J. 88; Fed. Cas. 8,906.

25. The assignee waives the want of notice before the bringing of the suit if he appears and pleads. Rowe v. Page, 13 N. B. R. 866.

26. Where a bankrupt is indorser on a note which falls due after the adjudication and before the appointment of an assignee, he may waive demand and notice. Ex parte Tremont National Bank, In re Battey, 16 N. B. R. 397; 2 Lowell, 409; 25 Pittsb. Leg. J. 84; Fed. Cas. 14,169.

### WARD.

See GUARDIAN AND WARD.

### WARRANT.

#### I. PROVISIONAL.

#### II. WHEN EFFECTIVE.

#### III. CONTENTS.

See PLEADING AND PRACTICE, 331; RENT, 20, 21; SCHEDULES, 82, 83, 84.

#### I. PROVISIONAL.

See ARREST, 14, 15.

1. Where a debtor is adjudicated bankrupt on a voluntary petition, but remains in control of his property and disposes of some of it and expresses an intention of going to Europe to adjust his foreign accounts, and has indicated that he would offer a composition, but has not done so, declaring that he could not, as his accounts were so confused, it is a proper case for the issue of a provisional warrant. In re Hale, 18 N. B. R. 335; Fed. Cas. 5,911.

2. A marshal has no authority under a provisional warrant to seize property outside of his district. *Carr v. Phillips*, 18 N. B. R. 527.

## II. WHEN EFFECTIVE.

3. To prevent a discontinuance of bankruptcy proceedings by the death of the bankrupt, the warrant is considered as issuing *eo instanti* with the entering of the order of adjudication, though it should not physically issue for some time after, and hence death between the adjudication and the physical issuance of the warrant does not discontinue such proceedings. *In re Litchfield*, 9 N. B. R. 506; 7 Ben. 259; Fed. Cas. 8,385.

## III. CONTENTS.

4. Where the warrant stated the present residences to be unknown, yet stated the former residences of the creditors, and the marshal returned notices mailed to such creditors, residences unknown, such notice is good. *In re Pulver*, 1 N. B. R. 47 (8 vo. ed.); 1 Ben. 381; 14 Pittsb. Leg. J. 589; Fed. Cas. 11,466.

5. A warrant which fails to contain a list of creditors, with their respective places of residence and the amount of their respective debts, is void. *In re Hall*, 2 N. B. R. 68; 16 Pittsb. Leg. J. 52; Fed. Cas. 5,922.

## WARRANT OF ATTORNEY.

See POWER OF ATTORNEY, II; PREFERENCES, IX, (d), 165, 247.

## WARRANTIES.

See ESTOPPEL, 19.

## WIFE.

See MARRIED WOMAN; SET-OFF, IV.

## WILL.

1. Where a devise of property is made to a trustee to pay the income to a person, free of liability for his debts, the beneficiary has not such an interest as would pass to his assignee. *Nichols, Ass. v. Eaton et al.*, 18 N. B. R. 421; 91 U. S. 716.

2. A testatrix made a devise to her son, to cease on his being adjudged bankrupt. He became bankrupt and his assignee brought a bill to subject the income devised to his administration. *Held*, that the limitation on the devise was valid. *Id.*

3. A will devised bonds to A., B. and C. and their heirs, and provided against alienation and for rents and profits to be paid them by the executors. In case of the death of either A., B. or C. without lawful issue, the share of such one was to go to the survivors and heirs forever. At the death of the testator, C. had several children living. *Held*, the remainder to the issue of C. was vested and alienable and passed to a general assignee in bankruptcy during the life of C. *Smith v. Scholtz et al.*, 17 N. B. R. 520.

## WITNESSES.

See EVIDENCE; ADJOURNMENT, 5.

## WORKMEN.

See OPERATIVES.

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